(24,097)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 946.

THE HOME BOND COMPANY, APPELLANT,

vs.

H. V. McCHESNEY, TRUSTEE IN BANKRUPTCY OF THE ESTATES OF THE AMERICAN FIBRE REED COMPANY AND THE NEW ENGLAND CHAIR COMPANY, BANKRUPTS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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a No. —.

Supreme Court of the United States.

HOME BOND COMPANY, Appellant,
vs.
H. V. MCCHESNEY, Trustee in Bankruptcy of the Estates of American Fibre Reed Co. and New England Chair Co., Bankrupts, Appellee.

Certified Transcript of Record.

Appeal from the United States Circuit Court of Appeals for the Sixth Circuit.

1 *Transcript of Record.*

Proceedings of the District Court of United States for the Eastern District of Kentucky, at a Regular Term Begun at the Federal Court Hall, in the City of Covington, on November 13, 1912.

Present: Honorable A. M. J. Cochran, Judge of the District Court of United States for the Eastern District of Kentucky.

HOME BOND COMPANY, Intervening Petitioner,
versus
H. V. MCCHESNEY, Trustee in Bankruptcy of the Estates of New England Chair Company and American Fibre Reed Company, Bankrupts, Defendant.

Citation.

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, ss:

United States District Court, Eastern District of Kentucky.

To H. V. McChesney, Trustee in Bankruptcy of American Fibre Reed Company and New England Chair Company, Greeting:

You are hereby cited and admonished to be and appear at a session of the United States Circuit Court of Appeals for the sixth circuit, to be holden at the city of Cincinnati, in said circuit, on the 1st day of September next, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Eastern District of Kentucky, wherein Home Bond Company is appellant, and H. V. McChesney, Trustee, is appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand, as Judge of the said District Court, and the seal of said Court, at Covington, this 5th day of August, in the year of our Lord one thousand nine hundred and thirteen and of our Independence the 138th year.

A. M. J. COCHRAN,
Judge of the U. S. District Court,
Eastern District of Kentucky.

I hereby accept service of the within citation this 18th day of August, 1913.

H. V. McCHESNEY, *Trustee;*
By BODLEY & BASKIN AND
BROWN & NUCKOLS,
His Attorneys.

2 *Agreed Statement in the Matter of Home Bond Company's Appeal.*

Filed July 23, 1913.

Comes the Home Bond Company, and comes H. V. McChesney, Trustee aforesaid, by their respective counsel, and pursuant to Equity Rule 77 of the "Rules of Practice for the Courts of Equity of the United States, promulgated by the Supreme Court of the United States, November 4, 1912, and effective February 1, 1913," do file herein this "Agreed Statement," subject to the approval of this Honorable Court—the same being in the matter of the appeal of the Home Bond Company from the decree made and entered herein on July 10, 1913, in the above entitled cause, by which decree said Home Bond Company has conceived itself aggrieved, and has filed its "Assignment of Errors," and its "Petition for Appeal." And the said Home Bond Company and the said McChesney, Trustee, do state that the following stipulations and the following parts of the Record are all that are necessary to properly present to the Honorable United States Circuit Court of Appeals for the Sixth Circuit, questions for determination raised by the appeal of the Home Bond Company, from the aforesaid decree.

(1) On February 1, 1912, the Berlin National Bank of Berlin, N. H., and other creditors of the New England Chair Company, and its successor, American Fibre Reed Company—both corporations—filed in the District Court of the United States for the Eastern District of Kentucky, their certain Petitions in Bankruptcy wherein they sought to force into involuntary bankruptcy the aforesaid New England Chair Company and American Fibre Reed Company. And such proceedings were had that on August 26, 1912, the said two Companies were duly adjudicated Bankrupts, and the administration of their affairs was referred to the Honorable D. W. Lindsey, Referee in Bankruptcy, at Frankfort, Kentucky. That on September 21, 1912, H. V. McChesney was duly appointed and did qualify as Trustee of the estates in bankruptcy of each of the aforesaid

Bankrupt Companies; and he has been ever since said time and is now said acting and duly qualified Trustee. That at a meeting of creditors duly called and had on October 22, 1912, the two above cases, viz: American Fibre Reed Company, No. 831, and New England Chair Company, No. 832, were consolidated and "directed to proceed as one cause." And it was further ordered "that in
3 the administration of the two estates, the assets should be considered and treated as if there were but one estate." And the said two estates have been ever since said time administered as one estate.

(2) That on November 13, 1912, the Home Bond Company, of Indianapolis, Indiana, filed its Intervening Petition herein in the matter of the New England Chair Company, Bankrupt, and on the same date filed an Intervening Petition in the matter of the estate of the American Fibre Reed Company, Bankrupt.

The Clerk of this Court will copy as part of the Record on appeal herein, the two aforesaid Intervening Claimant's Petitions together with the copies of the respective contracts of March 6, 1911, and November 9, 1911, between the New England Chair Company and American Fibre Reed Company, respectively as "First Party," and said Home Bond Company as "Second Party," which copies are filed with and made part of said original Claimant's Petitions; but the Clerk need not copy the other exhibits attached to said original Claimant's Petitions, inasmuch as reference is hereafter made to such exhibits with reference to the Amended Claimant's Petitions.

(3) Upon the filing of the aforesaid Claimant's Petitions, this Honorable Court did refer the matter of said claim, on the part of said Home Bond Company against the said H. V. McChesney, Trustee, for the moneys and accounts receivable therein mentioned, to the Honorable D. W. Lindsey, of Frankfort, Kentucky, sitting as Special Master herein.

(4) On December 16, 1912, said Home Bond Company filed before the Special Master its "Amended Claimant's Petition," and the Clerk will make copy of same for the purpose of this appeal, but will not copy any of the exhibits except "Certificate of Indebtedness," sheet No. 1 between the Home Bond Company and New England Chair Company, and "Report of Remittance," sheet No. 1, between said companies. And the Clerk will likewise copy "Certificate of Indebtedness" sheet No. 1, and "Report of Remittance" sheet No. 1, with reference to the dealings between the Home Bond Company and the American Fibre Reed Company. It is agreed between the parties hereto that the remaining "Certificate of Indebtedness" sheets and "Report of Remittance" sheets, referred to in said Amended Claimant's Petition, are similar to those copied by the Clerk, as just above directed, differing only in dates, names, and amounts,
4 and to make copies of all of them would be to needlessly encumber this Record.

(5) On January 17, 1913, H. V. McChesney, Trustee, filed his Response to the Intervening Claimant's Petition of the Home Bond Company in the matter of the American Fibre Reed Company, Bankrupt, and on the same day filed his Response to the Intervening Claimant's

Petition of the said Home Bond Company in the matter of the New England Chair Company, Bankrupt, and on the same day filed his Response to the Amended Claimant's Petition of said Home Bond Company, filed on December 16, 1912, in the aforesaid consolidated causes of the Reed Company and Chair Company, Bankrupts. By agreement of said Home Bond Company and said McChesney, Trustee, by their respective counsel, the affirmative matter contained in said Responses of said Trustee were considered as controverted of record. The Clerk will copy the three aforesaid responses.

(6) By agreement of parties, and the Honorable D. W. Lindsey, Special Master, the hearing of the said Home Bond Company's claim against said Trustee took place on February 4, 1913, before said Special Master at Frankfort, Kentucky, and on said day the said parties filed before said Special Master, as part of the Record and in lieu of proof, an "Agreed Statement of Facts" consisting of nineteen clauses. And the Clerk will copy said "Agreed Statement of Facts" in full.

(7) On March 10, 1913, the said Special Master filed herein a written Opinion, and at the same time his Report, in the matter pending before him. And the Clerk will copy said Opinion and Report of said Special Master.

(8) On March 13, 1913, the Home Bond Company filed in this cause its twelve written Exceptions to the said Special Master's Report. The Clerk will copy said Exceptions in full.

(9) On March 18, 1913, the aforesaid Exceptions of the said Home Bond Company to said Special Master's Report, were argued before this Honorable Court—the Honorable A. M J. Cochran sitting as presiding Judge—and the contentions of said Home Bond Company and said McChesney, Trustee, were presented by their respective counsel, and said Exceptions taken under submission. And on June 19, 1913, the said Court filed its written Opinion herein holding that said Exceptions should be overruled, and that the Report of said Special Master should be approved and confirmed. The Clerk will copy said Opinion in full.

(10) On July 10, 1913, the Court, in conformity to said Opinion, entered herein an Order and Decree overruling said Exceptions of the Home Bond Company to the said Special Master's Report and approving and confirming said Master's Report. The Clerk will copy said Order and Decree.

(11) Thereafter, viz: on July 23, 1913, the Home Bond Company did file herein its "Assignment of Errors" and "Petition for Appeal," and the Clerk will copy said "Assignment of Errors" and "Petition for Appeal."

Now then it is agreed between said Home Bond Co. and said McChesney, Trustee, by their respective counsel, that in making up the "Transcript of Record" for the Home Bond Company's appeal to the United States Circuit Court of Appeals for the Sixth Circuit, the Clerk of this Court will copy: (1) The Citation that issues upon this appeal; (2) This "Agreed Statement" in full; (3) The pleadings, exhibits, opinions, decree, and all other papers and orders designated herein, and in the sequence as in this "Agreed Statement" set forth;

(4) The appeal and supersedeas bond of said Home Bond Company herein in the matter of its said appeal.

Witness the hands of the parties hereto this July 23, 1913.

HOME BOND COMPANY,
By DUFFIN, SAPINSKY & DUFFIN,
Its Attorneys.
H. V. McCHESNEY, *Trustee,*
By BODLEY & BASKIN, BROWN & NUCKOLS,
His Attorneys.

Approved:

A. M. J. COCHRAN,
Presiding Judge of the Court Aforesaid.

Be it remembered, That heretofore, to-wit, on November 13, 1912, came the Home Bond Company, of Indianapolis, Indiana, by counsel and filed in the clerk's office of our said court at Covington, Kentucky, its Intervening Claimant's Petition in the Bankruptcy Proceedings No. 832 of New England Chair Company, Bankrupt.

Said Intervening Claimant's Petition is as follows:

6 *Intervening Claimant's Petition In re New England Chair Co.*

Filed Nov. 13, 1912.

Your Petitioner, Home Bond Company, says that it is and was at all times herein mentioned a corporation, duly organized and existing as such under and by virtue of the laws of the State of Indiana, with power to sue and be sued, contract and be contracted with, and to carry on business generally as a natural person, and especially to carry on the business of buying from others, accounts and bills receivable due them. That it has now and did have at all times herein mentioned its office and principal place of business in Indianapolis, Marion County, Indiana.

That on March 6, 1911, the New England Chair Company as the "first party," and this Petitioner, the Home Bond Company, as the "second party," entered into a written contract or agreement—a copy of which is filed herewith and made part hereof as fully as if incorporated herein—wherein and whereby this Petitioner agreed to buy from said New England Chair Company "all acceptable accounts" tendered to it by said "first party," and to pay therefor "the face value thereof less" certain discounts in said agreement mentioned, and reference is now made thereto for further particularity. Reference is also made to said agreement for the terms on and under which said accounts were sold by the said New England Chair Company to this Petitioner and bought by it, and it says that under and pursuant to the terms of the aforesaid agreement it did purchase from said New England Chair Company various accounts, as shown upon the sheets

hereto attached, and made part hereof as fully as if incorporated herein.

The said purchases were made on the dates shown on said sheets, and said sheets are many in number, and your Petitioner will not endeavor to specifically set out the numbers and dates, but refer to said sheets as fully as if same were incorporated herein. Said purchases were made between April 26, 1911 (Sheet No. 7), and November 16, 1911 (Sheet 5H-98)—both dates inclusive.

That each of said sheets is captioned "Certificate of Indebtedness," and gives the name and address of each debtor, the date of the bill, and the amount due, and same were duly executed and delivered to your Petitioner. That it paid a valuable consideration therefor, and pursuant to the terms of the contract of March 6, 1911, and in the amounts as shown in each of the aforesaid sheets. That it became the owner of said accounts from and after the aforesaid respective dates, and same were duly assigned to it on the books of the said New England Chair Company.

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It says that H. V. McChesney was, on September 21, 1912, duly appointed as Trustee of the estate in bankruptcy of the New England Chair Company, Bankrupt, and he did duly qualify as such Trustee, as required by law; and he has been ever since said time, and is now, the acting Trustee of said estate. That prior to his aforesaid appointment and qualification as Trustee, the said H. V. McChesney acted as Receiver, or custodian, of the assets of said New England Chair Company, under an appointment by the Honorable Referee herein, D. W. Lindsey, and as such Receiver, or custodian, there came into his hands the sum of $2,547.57, which thereafter (subsequent to his appointment and qualification as Trustee aforesaid), he did turn over to himself as Trustee, and which moneys he now holds as Trustee.

Your Petitioner says that said moneys were paid to said H. V. McChesney and received by him upon the accounts set out in the aforesaid "Certificate of Indebtedness" sheets, and which accounts, as heretofore shown, were at the time, and are now, the property of this Petitioner. That said Trustee has no right to the aforesaid $2,547.57, or any part thereof, but that said moneys are the absolute property of your Petitioner, and it is entitled to same, and to receive same from said Trustee.

That there may be other moneys received by said Trustee on the aforementioned accounts, which should likewise be turned over to your Petitioner as its property.

Your Petitioner will produce any and all further data, papers, memoranda, books of account, or anything else, which it may be properly required to produce, to establish fully its claim herein.

Wherefore, your Petitioner prays that an order may be entered herein directing and adjudging that said H. V. McChesney, as Trustee aforesaid, be required to pay over to it the aforesaid sum of $2,547.57, in his hands, as shown aforesaid, and that he be further adjudged and directed to pay over to it any and all other moneys which he may have collected as Trustee, upon or from the accounts owned by your Petitioner, as above shown,

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and that said Trustee be adjudged to have no interest in any of said moneys, and it prays that said Trustee be required to appear herein and show cause why such an order or judgment should not be entered, and it prays for all other and further relief to which in equity and good conscience it may be entitled.

HOME BOND COMPANY,
By DUFFIN, SAPINSKY & DUFFIN,
Its Attorneys.

STATE OF KENTUCKY,
County of Jefferson, ss:

S. M. Sapinsky says that he is one of the Attorneys for the Home Bond Company, which is a non-resident corporation of Kentucky, with no officer, or agent at present in the State of Kentucky; that the statements contained in the foregoing Petition are true as he verily believes.

S. M. SAPINSKY.

Subscribed and sworn to before me this October 29, 1912. My commission expires February 24, 1914.

VIRGIL O. DUFFIN,
Notary Public, Jefferson County, Kentucky.

The written contract or agreement referred to in said Petition is as follows:

This agreement, made this 6th day of March, 1911, at Indianapolis, Indiana, by and between New England Chair Co., hereinafter called first party, and the Home Bond Company, hereinafter called second party.

Witnesseth, that, for One Dollar ($1.00) and other good and valuable considerations, each to the other paid, receipt whereof is hereby acknowledged, the parties hereto have agreed and do hereby agree as follows:

First. That said second party shall buy from said first party all acceptable accounts tendered to it by said first party and pay therefor the face value thereof less the following discounts:

1 per cent. on accounts that are paid within 15 days;
2 per cent. on accounts that are paid within 30 days;
3 per cent. on accounts that are paid within 60 days;
4 per cent. on accounts that are paid within 90 days;
5 per cent. on accounts that are paid within 120 days;
6 per cent. on accounts that are paid within 150 days;
7 per cent. on accounts that are paid within 180 days;

subject however, to the terms of this and any subsequent written agreements executed by the parties hereto.

Second. That the second party shall pay:
78 per cent. on 30 day accounts;
77 per cent. on 60 day accounts;
76 per cent. on 90 day accounts;
75 per cent. on 120 day accounts;

74 per cent. on 150 day accounts;
73 per cent. on 180 day accounts;

upon delivery to and acceptance by second party of such accounts duly assigned to the party of the second part; and the remainder, less discount and deductions taken by the debtor, shall be paid immediately after the collection of the account by the second party, provided, however, no payment of the remainder shall be made while any of said accounts are in default.

Third. The first party shall properly assign and deliver to said second party all accounts purchased, including the right of stoppage in transitu, either in the name of the party of the first part or in the name of the party of the second part (provided, however, the party of the second part shall not be charged with negligence in not making stoppage in transitu in any event unless thereunto requested by the party of the first part). If the merchandise named in the accounts should be refused or returned, for any cause, the title to such merchandise shall be and remain in said second party until such accounts are paid.

Fourth. Said first party hereby guarantees the payment to the second party or its assigns of all accounts purchased hereunder according to the terms thereof. In the event of non-payment at maturity to said second party, of any accounts purchased as aforesaid, or should the debtor become insolvent, said first party hereby covenants and agrees to repurchase said accounts within five days after receipt of written notice thereof, and to pay therefor the same amount paid to the first party by said second party, plus the discount provided for in the first paragraph of this contract; said second party is hereby given the right without notice to said first party to credit any moneys coming into its possession, belonging to said first party, on its accounts.

Fifth. Immediately after the purchase of every account hereunder, said first party shall make upon its book an entry showing the absolute sale of said accounts to said second party, and said second party is hereby given the right and privilege of auditing the books, accounts and records of said first party, relating to said accounts, at any time that it may see fit so to do.

Sixth. Whereas it is for the mutual benefit of the parties hereto that the collection of said accounts shall in the first instance be remitted to the parties of the first part and in its name; the party of the first part shall at all times appoint some person or persons mutually acceptable to both of the parties hereto, their attorney-in fact to receive all such remittances in whatever form they may be made, and to transfer, assign and transmit all such proceeds to said party of the second part.

And said party of the first part shall immediately upon receipt of such remittances in whatever form the same shall be made, deliver the same to such attorney for transmittal to the party of the second part; and said attorney shall at all times have access to all mail received by said party of the first part and all books and records of the party of the first part, to discover what payments and remittances are made upon such accounts.

And in consideration of the execution of this agreement by the party of the second part, said party of the first part undertakes and agrees to guarantee the faithful conduct of said attorney-in-fact in the receipt, assignment and transmittal of all such payments or remittances. And upon the like consideration said party of the first part shall pay unto said attorney-in-fact compensation for all such services so rendered in that behalf; and that we will furnish and provide for said attorney-in-fact all necessary clerical or stenographic assistance for making reports to party of the first part, and all postage or express charges for transmitting reports and remittances; said attorney-in-fact shall also have the right and power, and it shall be his duty to endorse the name of the party of the first part on any freight or express bill or bill of lading relating to said accounts; and ratifying and confirming all its said attorney may do in the premises. And said attorney-in-fact as to all such matters shall receive such moneys or other remittance solely for the party of the second part and shall at all times be subject to its exclusive orders with relation thereto; and it is now mutually agreed between the parties hereto that E. Manning shall be and continue such attorney-in-fact to perform such duties, until by mutual agreement of the parties hereto, another person shall be appointed in his stead.

Seventh. That said second party in making purchase of accounts hereunder relies upon the guaranties and covenants of said first party herein contained and upon the written representations made to it by said first party as to the financial responsibility of said first party; that said written representation heretofore made and that may hereafter be made are for the purpose of establishing the credit of said first party with said second party so that sale of accounts may be made hereunder.

Eighth. That said first party shall execute and deliver to said second party or its assigns, any document necessary or proper to carry into effect this contract and should second party employ counsel or cause legal action to be instituted to enforce the payment of any of said accounts, or any part thereof, either in its own name or of the name of the party of the first part, then and in either case said first party shall immediately pay to said second party or its assigns, all court costs, expenses, attorney's and stenographer's fees which may be by it expended in such proceedings.

In Witness Whereof, the said first party has hereunto set its hand and seal, and said second party has caused these presents to be executed by its President and Secretary, and its corporate seal to be hereto attached.

NEW ENGLAND CHAIR CO., [SEAL.]
By A. D. MARTIN, *President.*

Attest:
CHAS. IRION, *Secretary.*

HOME BOND COMPANY,
By P. J. HAUSS, *Vice-President.*

Attest:
F. H. RUPERT, *Secretary.*

For and in consideration of the execution of the foregoing agreement by the Home Bond Company, the undersigned hereby guarantees to said Home Bond Company the full, prompt and faithful payment and discharge by New England Chair Co., of all and singular the agreements and provisions therein contained to be by said New England Chair Co. kept, observed and performed, and hereby waives notice of acceptance of this guarantee by the Home Bond Company.

In Witness Whereof, we, and each of us, have hereunto set our hands and seals this 6th day of March, 1911.

A. D. MARTIN. [SEAL.]
GRAHAM VREELAND. [SEAL.]
C. IRION. [SEAL.]

Witness:
CHARLES IRION.

And on the same date, viz: November 13, 1912, said Home Bond Company did likewise file its Intervening Claimant's Petition in the Bankruptcy Proceedings No. 831 of American Fibre Reed Company, Bankrupt.

Said Intervening Claimant's Petition is as follows:

11 *Intervening Claimant's Petition In re American Fibre Reed Co.*

Filed Nov. 13, 1912.

Your Petitioner, Home Bond Company, says that it is and was at all times herein mentioned a corporation, duly organized and existing as such under and by virtue of the laws of the State of Indiana, with power to sue and be sued, contract and be contracted with, and to carry on business generally as a natural person, and especially to carry on the business of buying from others accounts and bills receivable due them. That it has now and did have at all times herein mentioned its office and principal place of business in Indianapolis, Marion County, Indiana.

That on November 9, 1911, the American Fibre Reed Company, as the "first party," and this Petitioner, the Home Bond Company, as the "second party," entered into a written contract or agreement—a copy of which is filed herewith and made a part hereof as fully as if incorporated herein—wherein and whereby this Petitioner agreed to buy from said American Fibre Reed Company "all acceptable accounts" tendered to it by said "first party," and to pay therefor "the face value thereof less" certain discounts in said agreement mentioned, and reference is now made thereto for further particularity. Reference is also made to said agreement for the terms on and under which said accounts were sold by the said American Fiber Reed Company to this Petitioner and bought by it, and it says that under and pursuant to the terms of the aforesaid agreement it did purchase from said American Fibre Reed Company various accounts, as shown upon the sheets hereto attached, and made part hereof as fully as if

incorporated herein, and which bear the following dates and are designated by the following numbers:

	E- 1	November 18, 1911,
	E- 2	November 20, 1911,
	E- 3	November 22, 1911,
	E- 4	November 23, 1911,
	E- 5	November 24, 1911,
	E- 6	November 25, 1911,
	E- 7	November 28, 1911,
	E- 8	November 29, 1911,
	E- 9	December 2, 1911,
	E-11	December 6, 1911,
	E-12	December 7, 1911,
	E-13	December 8, 1911,
12	E-14	December 9, 1911,
	E-15	December 12, 1911,
	E-16	December 13, 1911,
	E-17	December 14, 1911,
	E-18	December 15, 1911,
	E-19	December 16, 1911,
	E-20	December 18, 1911,
	E-21	December 20, 1911,
	E-22	December 22, 1911,
	E-23	December 23, 1911,
	E-24	December 26, 1911,
	E-25	December 28, 1911,
	E-26	December 30, 1911,
	E-27	January 2, 1912,
	E-28	January 5, 1912,
	E-29	January 10, 1912,
	E-30	January 13, 1912,
	E-31	January 17, 1912,
	E-32	January 19, 1912,
	E-33	January 20, 1912,
	E-34	January 22, 1912,
	E-35	January 24, 1912,

That each of said sheets is captioned "Certificate of Indebtedness," and gives the name and address of each debtor, the date of the bill, and the amount due, and same were duly executed and delivered to your Petitioner. That it paid a valuable consideration therefor, and pursuant to the terms of the contract of November 9, 1911, and in the amounts as shown in each of the aforesaid sheets. That it became the owner of said accounts from and after the aforesaid respective dates, and same were duly assigned to it on the books of the said American Fibre Reed Company.

It says that H. V. McChesney was, on September 21, 1912, duly appointed as Trustee of the estate in bankruptcy of the American Fibre Reed Company, Bankrupt, and he did duly qualify as such Trustee, as required by law; and he has been ever since said time, and is now, the acting Trustee of said estate. That prior to his afore-

said appointment and qualification as Trustee, the said H. V. McChesney acted as Receiver, or custodian, of the assets of said American Fibre Reed Company, under an appointment by the Honorable Referee herein, D. W. Lindsey, and as such Receiver, or cus-
13 todian, there came into his hands the sum of $2,274.66, which thereafter (subsequent to his appointment and qualification as Trustee aforesaid), he did turn over to himself as Trustee, and which moneys he now holds as Trustee.

Your Petitioner says that said moneys were paid to said H. V. McChesney and received by him upon the accounts set out in the aforesaid "Certificate of Indebtedness" sheets, and which accounts, as heretofore shown, were at the time, and are now, the property of this Petitioner. That said Trustee has no right to the aforesaid $2,274.66, or any part thereof, but that said moneys are the absolute property of your Petitioner, and it is entitled to same, and to receive same from said Trustee.

That there may be other moneys received by said Trustee on the aforementioned accounts, which should likewise be turned over to your Petitioner as its property.

Your Petitioner will produce any and all further data, papers, memoranda, books of account, or anything else, which it may be properly required to produce, to establish fully its claim herein.

Wherefore, your Petitioner prays that an order may be entered herein directing and adjudging that said H. V. McChesney, as Trustee aforesaid, be required to pay over to it the aforesaid sum of $2,274.66, in his hands, as shown aforesaid, and that he be further adjudged and directed to pay over to it any and all other moneys which he may have collected as Trustee, upon or from the accounts owned by your Petitioner, as above shown, and that said Trustee be adjudged to have no interest in any of said moneys, and it prays that said Trustee be required to appear herein, and show cause why such an order or judgment should not be entered, and it prays for all other and further relief to which in equity and good conscience it may be entitled.

HOME BOND COMPANY,
By DUFFIN, SAPINSKY & DUFFIN,
Its Attorneys.

STATE OF KENTUCKY,
County of Jefferson, ss:

S. M. Sapinsky says that he is one of the Attorneys for the Home Bond Company, which is a non-resident corporation of Kentucky, with no officer, or agent at present in the State of Kentucky;
14 that the statements contained in the foregoing Petition are true as he verily believes.

S. M. SAPINSKY.

Subscribed and sworn to before me this October 29, 1912. My Commission expires February 24, 1914.

VIRGIL O. DUFFIN,
Notary Public, Jefferson County, Kentucky.

The written contract or agreement referred to in said Petition is as follows:

This Agreement, made this 9th day of November, 1911, at Indianapolis, Indiana, by and between American Fibre Reed Co., hereinafter called first party, and the Home Bond Company, hereinafter called second party.

Witnesseth, that, for One Dollar ($1.00) and other good and valuable considerations, each to the other paid, receipt whereof is hereby acknowledged, the parties hereto have agreed and do hereby agree as follows:

First. That said second party shall buy from said first party all acceptable accounts tendered to it by said first party and pay therefor the face value thereof less the following discounts:

1 per cent. on accounts that are paid within 15 days;
2 per cent. on accounts that are paid within 30 days;
3 per cent. on accounts that are paid within 60 days;
4 per cent. on accounts that are paid within 90 days;
5 per cent. on accounts that are paid within 120 days;
6 per cent. on accounts that are paid within 150 days;
7 per cent. on accounts that are paid within 180 days;

subject, however, to the terms of this and any subsequent written agreements executed by the parties hereto.

Second. That the second party shall pay:

78 per cent. on..... 30 day accounts;
77 per cent. on..... 60 day accounts;
76 per cent. on..... 90 day accounts;
75 per cent. on.....120 day accounts;
74 per cent. on.....150 day accounts;
73 per cent. on.....180 day accounts;

upon delivery to and acceptance by second party of such accounts duly assigned to the party of the second part; and the remainder, less discount and deductions taken by the debtor, shall be paid immediately after the collection of the account by the second party; provided, however, no payment of the remainder shall be made while any of said accounts are in default.

Third. The first party shall properly assign and deliver to said second party all accounts purchased, including the right of stoppage in transitu, either in the name of the party of the first part or in the name of the party of the second part (provided, however, the party of the second part shall not be charged with negligence in not making stoppage in transitu in any event unless thereunto requested by the party of the first part). If the merchandise named in the accounts should be refused or returned, for any cause, the title to such merchandise shall be and remain in said second party until such accounts are paid.

Fourth. Said first party hereby guarantees the payment to the second party or its assigns of all accounts purchased hereunder according to the terms thereof. In the event of non-payment at maturity to said second party, of any accounts purchased as aforesaid, or

should the debtor become insolvent, said first party hereby
15 covenants and agrees to repurchase said accounts within five days after receipt of written notice thereof, and to pay therefor the same amount paid to the first party by said second party, plus the discount provided for in the first paragraph of this contract; said second party is hereby given the right without notice to said first party to credit any moneys coming into its possession, belonging to said first party, on its accounts.

Fifth. Immediately after the purchase of every account hereunder, said first party shall make upon its book an entry showing the absolute sale of said accounts to said second party, and said second party is hereby given the right and privilege of auditing the books, accounts and records of said first party, relating to said accounts, at any time that it may see fit so to do.

Sixth. Whereas it is for the mutual benefit of the parties hereto that the collection of said accounts shall in the first instance be remitted to the parties of the first part and in its name; the party of the first part shall at all times appoint some person or persons mutually acceptable to both of the parties hereto, said attorney-in-fact to receive all such remittances in whatever form they may be made, and to transfer, assign and transmit all such proceeds to said party of the second part.

And said party of the first part shall immediately upon receipt of such remittances in whatever form the same shall be made, deliver the same to such attorney for transmittal to the party of the second part; and said attorney shall at all times have access to all mail received by said party of the first part and all books and records of the party of the first part, to discover what payments and remittances are made upon such accounts.

And in consideration of the execution of this agreement by the party of the second part, said party of the first part undertakes and agrees to guarantee the faithful conduct of said attorney-in-fact in the receipt, assignment and transmittal of all such payments or remittances. And upon the like consideration said party of the first part shall pay unto said attorney-in-fact compensation for all such services so rendered in that behalf; and that they will furnish and provide for said attorney-in-fact all necessary clerical or stenographic assistance for making reports to party of the first part, and all postage or express charges for transmitting reports and remittances; said attorney-in-fact shall also have the right and power, and it shall be his duty to endorse the name of the party of the first part on any freight or express bill or bill of lading relating to said accounts; and ratifying and confirming all its said attorney may do in the premises. And said attorney-in-fact as to all such matters shall receive such moneys or other remittance solely for the party of the second part and shall at all times be subject to its exclusive orders with relation thereto; and it is now mutually agreed between the parties hereto that E. Manning and E. W. John shall be and continue such attorneys-in-fact to perform such duties, until by mutual agreement of the parties hereto, another person shall be appointed in this stead.

Seventh. That said second party in making purchase of accounts

hereunder relies upon the guaranties and covenants of said first party herein contained and upon the written representations made to it by said first party as to the financial responsibility of said first party; that said written representation heretofore made and that may hereafter be made are for the purpose of establishing the credit of said first party with said second party so that sale of accounts may be made hereunder.

Eighth. That said first party shall execute and deliver to said second party or its assigns, any document necessary or proper to carry into effect this contract and should second party employ counsel or cause legal action to be instituted to enforce the payment of
16 any of said accounts, on any part thereof either in its own name or of the name of the party of the first part, then and in either case said first party shall immediately pay to said second party or its assigns, all court costs, expenses, attorney's and stenographer's fees which may be by it expended in such proceedings.

In Witness Whereof, the said first party has hereunto set its hand and seal, and said second party has caused these presents to be executed by its President and Secretary, and its corporate seal to be hereto attached.

AMERICAN FIBRE REED CO., [SEAL.]
By A. D. MARTIN, *President.*

Attest: A. C. McCLAUGHRY,, *Secretary.*

HOME BOND COMPANY,
By P. J. HAUSS, *Vice-President.*

Attest: W. D. SHREVE, *Secretary.*

For and in consideration of the execution of the foregoing agreement by the Home Bond Company, the undersigned hereby guarantees to said Home Bond Company the full, prompt and faithful payment and discharge by American Fibre Reed Co., of all and singular the agreements and provisions therein contained to be by said American Fibre Reed Co., kept, observed and performed, and hereby waives notice of acceptance of this guarantee by the Home Bond Company.

In Witness Whereof, we, and each of us, have hereunto set our hands and seals this 9th day of November, 1911.

A. D. MARTIN. [SEAL.]
A. C. McCLAUGHRY. [SEAL.]

Witness-:
GRAHAM VREELAND.
J. E. DORLAND.

And on December 16, 1912, said Home Bond Company did file its "Amended Claimant's Petition" in the consolidated causes in Bankruptcy No. 831 and No. 832 of American Fibre Reed Company and New England Chair Company, Bankrupts.

Said "Amended Claimant's Petition" is as follows:

Amended Claimant's Petition in Consolidated Causes.

Filed Dec. 16, 1912.

Your Petitioner, Home Bond Company, of Indianapolis, Indiana, amends its Intervening Claimant's Petition herein, in order to conform to, and in compliance with the Order of November 26,
17 1912, of the Honorable D. W. Lindsey, sitting as Special Master, and for amendment says:

That for brevity, it will hereafter refer to itself as "Claimant." That it files herewith and makes same part hereof, with reference to the New England Chair Company, 98 schedules, each captioned, "Certificate of Indebtedness;" that said schedules are numbered 1 to 98 consecutively. That each of said schedules consists of 1 page, except the following: No. 1 consists of 14 pages; No. 2, 8 pages; No. 6, 3 pages; No. 98, 3 pages, and No. 3, No. 4, No. 5, No. 7, No. 8, No. 9, No. 11, No. 12, No. 22 and No. 23, 2 pages each. That said schedules do each show the following: (*a*) The date of the account purchased, under the caption, "Date of Bill;" (*b*) The name of the debtor of said New England Chair Company, under the caption, "Debtor;" (*c*) The address of said debtors, under the caption, "Address;" (*d*) The amount of each account, under the caption, "Amount." There likewise appears on said schedules, just preceding each amount, a number, which is this Claimant's serial number for said account, and used for further reference and identification. Thus, on page 1, schedule 1, Certificate of Indebtedness, the first item is "November 8, 1910, Allen Furniture Company, Louisville, Ky., 8,480, $5.50." This means that this Claimant was buying from said New England Chair Company its bill of November 8, 1910, of said Allen Furniture Company, of Louisville, Kentucky, calling for $5.50. That said account was thereafter to be known as account 8480 on this Claimant's books and remittance sheets and other papers that might refer to said account.

That at the bottom of each schedule appears the total amount paid by this Claimant to said New England Chair Company for the accounts shown on said schedule; the date when said payment was made; the amount of reserve in said accounts; and the "service" charge, viz: profit to this Claimant in said matter. To illustrate, at the bottom of schedule 1, viz: on the 14th page thereof, it is shown that on March 7, 1911, this Claimant paid to the New England Chair Company the sum of $5,880.60 in the matter of the accounts in said schedule aggregating $7,840.80. That, under the Contract of Sale between this Claimant and said Chair Company, there would be an equity in said accounts to said Chair Company of
18 20% thereof, viz: $1,568.16. That this Claimant's service charge was 5% of said amount, viz: $392.04. Said three items, viz: service charge to this Claimant of 5%, $392.04; reserve to Chair Company, 20%, $1,568.16; and check to Chair Company of $5,880.60, make a grand total of $7,840.80, which, as above, is the aggregate of said accounts on said schedule 1.

That under the Contract of March 6, 1911—a copy of which is filed with the original Petition of this Claimant herein—it is shown that this Claimant was to buy certain accounts from said Chair Company, and to charge for same various rates shown in said Contract; for instance (see line 13 of said Contract): "5% on accounts that were paid within 120 days." That all of the accounts which this Claimant purchased from said New England Chair Co., and from said American Fibre Reed Company, were treated and regarded as "120 day" accounts, and, accordingly, 5% was deducted from said accounts as the charge of this Claimant against same, and said 5% represents its charge for buying said accounts, and its compensation for its said services in that regard; or, in other words, that the said New England Chair Company was selling said accounts to this Claimant at a 5% discount.

That under the aforesaid Contract of March 6, 1911, should this Claimant have received in the matter of the accounts listed on said schedule No. 1, said $7,840.80, then there would be due from it to said Chair Company the aforesaid "reserve" of 20%, viz: $1,568.16, and it would be incumbent upon Claimant to return same to said Chair Company, subject, however, to such rights of retention as the aforesaid Contract might give to this Claimant. As to this feature, this Claimant will further on more specifically dwell.

That the remaining schedules show the same matters as schedule No. 1, varying only as to the names, amounts, reserve, "service," etc. That each of said 98 schedules correctly shows the moneys which this Claimant paid to said Chair Company, its charges in the matter of said accounts, and the moneys which it would owe to said Chair Company, should said accounts have been paid in full; and likewise shows all other matters hereinabove set forth. That said Chair Company has an exact copy of each one of the aforesaid schedules, as well as a copy of each one of the remittance reports hereinafter mentioned.

19 It says that as said accounts were collected, the said Chair Company would turn same over to this Claimant, and this Claimant would, immediately upon receipt of same, make out a sheet known as "Report of Remittances," and it files herewith 213 "Report of Remittance" sheets. The first 139 of said Report of Remittance sheets were moneys collected by said Chair Company, and turned over to this Claimant, and the remaining sheets, from 140 to 213, show accounts collected by this Claimant. An explanation of one of said sheets will suffice. Thus—Sheet No. 1 of said "Report of Remittances," bearing date, March 9, 1911, shows the names of the accounts in question, the schedule, the serial number, the amount of invoice, and other data. Said sheet shows that 8 accounts were collected, which (on their face, as same appears on the schedules, viz: Certificate of Indebtedness sheets aforementioned) call for $290.21. That, as a matter of fact, there was collected on said accounts $285.18—the said payers of said accounts claiming a total discount of $5.03, as shown on said sheet. That inasmuch as said accounts were paid within 15 days, this Claimant should repay to said New England Chair Company 4%, viz: $11.61, inasmuch as

line 1 of the Agreement of March 6, 1911, calls for "1% on accounts that are paid within 15 days." A reserve of 20% on the face of the accounts of $290.21 would call for $58.04. Add to said reserve the above sum of $11.61, would leave due said Chair Company from this Claimant, the sum of $69.65. From same should be deducted the discount which the debtors of said Chair Company had taken, as shown by said sheet, amounting to $5.03, which would leave a net balance of $64.62, which this Claimant sent to said New England Chair Company. That a study of sheet No. 1 will readily make clear how said matter was conducted.

That the accounts embraced on said sheets are easily traced on the aforementioned schedules, by virtue of reference to same, and the "serial" number, as well as the name of the debtor, and the amount of his bill.

That of the aforesaid 213 remittance sheets, the first 139 sheets show the sum of money turned over to this Claimant by said New England Chair Company, in the matter of accounts, and the exact amount of money returned by this Claimant to said Chair Company, giving the exact dates when said money was so returned.

That beginning with sheet 140, dated January 23, 1912,
20 to and including sheet 213, dated December 3, 1912, the amounts shown on said sheets as money which this Claimant should have turned back to said Chair Company, were not turned back by it to said Chair Company, but retained by it under the authority given it by the aforesaid Agreement of March 6, 1911, which will be hereinafter more fully gone into.

That on various of said sheets appear certain items known as "extra service." That same consists of a charge of 1-30 of 1% for each day that the account ran over the time stipulated in said Agreement, and was pursuant to said Agreement and as contemplated thereby. To illustrate: This Claimant agreed to buy accounts from said Chair Company, and to pay it the face thereof, less 5% for "120 day" accounts, and did pay at said rate. Should the account in question not have been paid within said 120 days, then pursuant to said Contract, or Agreement, of March 6, 1911, this Claimant was entitled to receive from said New England Chair Company in the matter of said account for each day after the said 120 days, the sum of 1-30 of 1% thereof.

That as shown by said sheets the total amount of moneys due from this Claimant to said Chair Company in the matters of the accounts shown on said sheets would be $978.64. That two typewritten sheets hereto attached, show specifically the accounts totaling the aforesaid $978.64. This Claimant's retention of $978.64 and its failure to pay same to said Chair Company will be hereinafter fully explained, in connection with its failure to pay certain moneys in the American Fibre Reed Company's matter.

That the above reference to "extra service" applies to the American Fibre Reed Company accounts. Claimant files herewith and makes same part hereof 35 "Certificate of Indebtedness" schedules in the matter of the purchase of accounts from the American Fibre Reed Company. That schedule No. 1 bears date November 18, 1911,

and shows that on said date this Claimant paid to said American Fibre Reed Company the sum of $417.18 for $629.90 worth of accounts, for which this claimant charged "service" of 5%, viz: $31.34, and in which accounts—when collected—there would be an equity, or "reserve" of 20% to said Reed Company, amounting to $125.38. That the last of said schedules, viz: schedule No. 35, shows a purchase on January 24, 1912, of accounts, as therein enu-
21 merated, and the payment of the sums therein shown. That said schedules are complete, and the explanation heretofore given as to the New England Chair Company's schedules, applies to the American Fibre Reed Company's schedules.

That Claimant files herewith and makes part hereof with reference to said American Fibre Reed Company, "Report of Remittances" sheets, numbered from 1 to 78 (both inclusive), and the explanation heretofore given of sheet No. 1 "Report of Remittance" as to the New England Chair Company, apply with equal force as to the American Fibre Reed Company's remittance sheets, except that the first 9 sheets show moneys actually returned by this Claimant to said Reed Company on the dates shown on said remittance sheets, and the remaining sheets, viz: from 10 to 78, show the amounts which would have been turned over to said Reed Company, but for the reasons hereinafter set forth. That sheets 10 to 78 disclose that this Claimant received $1,265.38, which it did not turn over to said Reed Company, and its reasons for not turning same over, are as follows:

That the Agreement of November 9, 1911, between this Claimant and the American Fibre Reed Company provides (lines 50, 51 and 52), that the said American Fibre Reed Company should appoint a mutually satisfactory person to receive the accounts for it, and "transfer, assign and transmit all such proceeds" to this Claimant. (See lines 48 to 52.) And said Agreement further provides that said person designated as "Attorney-in-fact" should be compensated for said services by said American Fibre Reed Company. (Lines 58 to 65.) That one E. Manning and E. W. John were appointed attorneys-in-fact, and this Claimant was compelled to, and did pay to said Manning on each of the following dates, during the year 1912, the sum of $100 00—March 13th, April 6th, May 7th, June 7th, July 8th, August 12th, September 12th and October 7th. That said $100.00 per month was a reasonable charge for the service of said Manning, and said total of $800.00 should have been paid by said Reed Company to said Manning, but it failed to do so, and this Claimant had the right, under the Agreement of November 9, 1911, to make such payments, and to charge same against any moneys, or "reserve," in its hands belonging to said Reed Company.

That the 8th clause (lines 77 to 82 inclusive and other parts of said Agreement), permit this Claimant to pay the necessary
22 collection charges, court costs, and expenses incurred in the matter of the collection of said accounts, and that it paid the following items during this year:

March 18th, telegram 80 cents; March 25th, printing drafts,

$5.00; June 3rd, Jas. R. Duffin, Attorney, for collection, $21.95; June 17th, to said Attorney, $5.00; July 5th, to said Attorney for expenses, $14.82; July 5th, to said Attorney for court costs, $5; July 17th, to J. P. Lane, Notary fees, $9.00; July 20th, to said Attorney for court costs, $7.50; August 5th, to R. G. Dun & Company, court costs, $10.00; August 15th, to R. G. Dun & Company, court costs, $5.00; October 22nd, Attorneys' Mercantile Agency Company, collection charges, $55.92; November 12th, Rice & Montgomery, Attorneys, collection, $15.00; November 12th, to Jas. R. Duffin, Attorney, for collection, $5.00. That said court costs and collection charges total $159.99. That same was subject to a credit of court costs returned as follows: August 1st, from Duffin, $7.50; August 8th, from Duffin, $2.15; November 12th, from R. G. Dun & Company, $10.00—thus leaving $140.34 expended by this Claimant for Attorney's fees, court costs, etc., in collecting certain accounts sold it. Add to $140.34 the above $800.00 paid to said E. Manning, makes a total of $940.34 to be debited against the aforesaid $1,265.38, leaving a balance in its hands belonging to said American Fibre Reed Company of $325.04. Typewritten sheets hereto attached show the items constituting said $1,265.38. That heretofore it is shown that there is a balance in its hands belonging to said Chair Company of $978.64, and this Claimant states that it has the right to hold said two sums of $978.64 of the New England Chair Company, and $325.04 of the American Fibre Reed Company, because of the authority and privileges given it under the aforesaid Agreement with said Chair Company, and said Reed Company, bearing date respectively March 6, 1911, and November 9, 1911. Said Agreements show that said Chair Company and Reed Company guaranteed the accounts to be thereafter sold by it to this Claimant, and said Agreements further show that should this Claimant be unable to collect any of the accounts, that it is given the right "to credit any moneys coming into its possession belonging to said" Chair Company and Reed Company, respectively, in payment of said "bad" accounts. (See the 4th clause of said Agreements.)

That the proper construction of said agreements permits
23 this Claimant to withhold any moneys due from it to said Chair Company and Reed Company respectively, as a guarantee, or security, against unpaid accounts which may turn out "bad," or worthless. That there are unpaid to date New England Chair Company accounts aggregating all told $2,364.34. The names of the debtors, their addresses, the Certificate of Indebtedness schedules, and the amount of the accounts are shown on two typewritten sheets hereto attached, and captioned: "Accounts uncollected and unpaid to December 14, 1912, of New England Chair Company." That, accordingly, this Claimant has the right to withhold the aforesaid $978.64 until the aforesaid accounts have been paid.

That the aforesaid $325.04, American Fibre Reed Company, money—this Claimant has the right to retain to secure it in the matter of $613.53, uncollected accounts of the American Fibre Reed Company, as shown on the typewritten sheet hereto attached, and captioned, "American Fibre Reed Company's accounts uncollected

to December 14, 1912." That said typewritten sheet is similar in character to the New England Chair Company sheets, just above referred to.

This Claimant, therefore, asserts its right to retain the aforesaid two sums of $978.64 and $325.04, to secure it in the payment of the aforesaid unpaid accounts. It further says that said two funds are subject to the additional charges of the payment of court costs, expenses, Attorney's fees, and stenographer's charges, that may be expended in the collection thereof. And that in view of the largeness of the unpaid accounts, that its right to retain said two funds should not be disturbed.

It says further that it is entitled to charge against said funds the fees which it may incur in the matter of the services of its Attorneys herein, Messrs. Duffin, Sapinsky & Duffin, of Louisville, Kentucky, in seeking to enforce its right and claim to the fund now in the hands of the Trustee herein, H. V. McChesney.

That the said Agreements of March 6, 1911, and November 9, 1911, contemplate that this Claimant should be paid its counsel fee whenever it was compelled to employ counsel in order to recover said accounts, and that said right was not made dependable upon the person from whom it was compelled to seek a recovery of said accounts. That under said Agreements (especially the 8th clause thereof) this Claimant has the undoubted right to charge
24 against the above funds of $978.64 and $325.04, such fees as may be charged it by its aforesaid Attorneys in the present instance, in the matter of its endeavor to recover from the Trustee herein, the accounts and moneys in question.

That the Agreements were executed and made at Indianapolis, Indiana, and show on their faces that they are Indiana contracts and governed by the laws of Indiana, and the laws of said State permit Attorneys' fees to be recovered in instances such as the one at bar.

Claimant says that a typewritten sheet attached hereto, and made part hereof, shows the "list of accounts collected and held by H. V. McChesney, Trustee," in the matter of the New England Chair Company accounts. That said typewritten sheet shows that said McChesney has collected on the accounts therein specified a total of $2,571.37, which belongs to this Claimant under the Agreement aforesaid of March 6, 1911, and which it has the right to receive pursuant to the aforesaid Agreement. And the said H. V. McChesney, as Trustee, has no right, title or interest whatever in or to said $2,571.37, and especially has no right whatever to withhold same from this Claimant.

Claimant says that H. V. McChesney, as Trustee, has collected in the matter of the American Fibre Reed Company accounts a total of $2,358.32, as shown on the two typewritten sheets hereto attached and designated "list of accounts collected and held by H. V. McChesney, Trustee." That this Claimant is entitled to receive from said H. V. McChesney, Trustee, the aforesaid $2,358.32, pursuant to and by virtue of the Agreement of November 9, 1911, and it only

has the right to said fund, and said McChesney, as Trustee, has no right to withhold same, or any part thereof, from it.

Claimant says that the aforesaid Chair Company and Reed Company had in its possession, and that there is, therefore, now in the hands of H. V. McChesney, Trustee, exact copies of all of the aforesaid "Certificate of Indebtedness" schedules, and all of the aforesaid "Report of Remittances" sheets, and said copies and the books, papers, memoranda, etc., of said Bankrupt concerns, should disclose to said Trustee, and its counsel, all of the data hereinabove set forth, and all of the matters herein set forth, are within the knowledge and possession of said Trustee, and said matters can be verified by said Trustee by reason of the copies aforesaid, and the books, papers and data in his possession.

25 Wherefore, this Claimant prays that it be decreed and adjudged that H. V. McChesney, Trustees, has no right whatever to retain, or keep back, from this Claimant the aforesaid two funds of $2,571.37 and $2,358.32, nor any part thereof; and that it be adjudged that this Claimant is entitled to said two funds; and that said McChesney, Trustee, be directed and ordered to pay over and deliver to this Claimant the aforesaid two funds, or sums of money. That a further Order be entered herein restraining said McChesney, Trustee, from collecting, or receiving, any part of the New England Chair Company's or American Fibre Reed Company's "unpaid" accounts, shown on the sheets heretofore referred to, and hereto attached; and that it be adjudged that this Claimant alone has the right to collect, receive and receipt for said "unpaid" accounts. And Claimant further prays that said Trustee be required to pay its costs herein expended, and it prays for all other and further relief to which in equity and good conscience it may appear to be entitled.

HOME BOND COMPANY,
By DUFFIN, SAPINSKY & DUFFIN,
Its Attorneys.

STATE OF KENTUCKY,
County of Jefferson, ss:

S. M. Sapinsky says that he is one of the Attorneys for the Home Bond Company, which is a non-resident corporation of Kentucky, with no officer, or agent at present in the State of Kentucky; that the statements contained in the foregoing Amended Claimant's Petition are true, as he verily believes.

S. M. SAPINSKY.

Subscribed and sworn to before me this December 14, 1912. My Commission expires February 24, 1914.

OWEN D. DUFFIN,
Notary Public, Jefferson County, Kentucky.

Certificate of Indebtedness Sheet No. 1 in re. New England Chair Company referred to in above Pleading, is as follows:

Number 1.

New England Chair Co.

Certificate of Indebtedness.

This is to Certify that the persons named below are indebted to the undersigned in the sums set opposite their respective names, for goods sold and delivered:

26

Date of bill.	Debtor.	Address.		Amount.
Nov. 8.	Allen Furniture Co.,	Louisville, Ky.....	8420	$5.50
Nov. 11.	Allen Furniture Co.,	Louisville, Ky.....	8421	28.42
Nov. 15.	Allen Furniture Co.,	Louisville, Ky.....	8422	21.00
Nov. 21.	Allen Furniture Co.,	Louisville, Ky.....	8423	29.85
Dec. 19.	Allen Furniture Co.,	Louisville, Ky.....	8424	7.00
Nov. 10.	Alnson Furniture Co.,	Americus, Ga.....	8425	17.59
Jan. 14.	Alnson Furniture Co.,	Americus, Ga.....	8426	63.00
Dec. 22.	J. R. Albin,	Rosine, Ky.....	8427	6.16
Oct. 23.	Mott Ayres,	Paducah, Ky.....	8428	141.00
Oct. 23.	Mott Ayres,	Paducah, Ky.....	8429	30.00
Dec. 15.	Barksdale Bros. Co.,	Paducah, Ky.....	8430	27.40
Dec. 19.	J. Bamberger,	Paducah, Ky.....	8431	13.88
Dec. 28.	H. W. Bevile,	Bowling Green, Ky.....	8432	36.95
Dec. 14.	Bardwell Furn. & Und. Co.,	Bardwell, Ky..	8433	42.45
Dec. 8.	Berry Bros. & Clark,	Uniontown, Ky.....	8434	25.25
Jan. 2.	Benedict Tea & Coffee Co.,	Louisville, Ky..	8435	7.75
Dec. 14.	G. W. Bingham,	Sidney, O.....	8436	19.50
Jan. 2.	F. F. Blanchard Co.,	Bristol, Va.....	8437	53.00
Dec. 30.	S. Bishop,	Morehead, Ky.....	8438	30.25
Jan. 2.	Brewer & Co.,	Lewisport, Ky.....	8438	7.75
Dec. 18.	E. T. Carrico,	Stithton, Ky.....	8440	11.50
Nov. 16.	C. D. Chapman Co.,	Geneva, Ala.....	8441	37.59
Jan. 25.	C. F. Brower & Co.,	Lexington, Ky.....	8442	22.00
Feb. 11.	Bardstown Furniture Co.,	Bardstown, Ky...	8443	10.75
Feb. 10.	Bradford Whol. Furn. Co.,	Nashville, Tenn.	8444	18.60
Feb. 10.	Chicago House Wrecking Co.,	Chicago, Ill..	8445	142.08
				$857.04

(N. B.—All Bills of Lading and Express Receipts shall accompany enclosed Statements of Accounts.)

Dated at ——, this — day of ——, 19—.

For and in consideration of the sum of — dollars ($—), to the undersigned in hand paid, the receipt whereof is hereby acknowledged, the undersigned hereby sells, assigns and transfers to Home Bond Company, a corporation, all right, title and interest in and to the contracts and open accounts above named, including the right of

stoppage in transitu, either in its own name or in the name of the undersigned (provided, however, the Home Bond Company shall not be charged with negligence in not making stoppage in transitu in any case, unless thereunto requested by the undersigned), and the invoices, which amount to — dollars ($—), are herewith delivered to Home Bond Company at Indianapolis, Indiana. The undersigned guarantees that the balances due on said contracts and open accounts are correctly set out in the above schedule thereof, and that full deliveries have been made on all said contracts and open accounts in accordance with the specifications of the buyer; that there is no contra account against any of them; that the amounts due on said contracts and open accounts, as set out in said schedule, are not disputed by the debtor, are not past due; that there are no offsets against said accounts or any of them, for freight, drayage or other carrying charges, commissions, damages or any other counterclaims of any nature whatsoever, but the amount set out in each item of said schedule is not and the payment of said item or items is not contingent on the fulfillment of any contract, past or future, and that entries have been made on our books disclosing the absolute sale thereof to Home Bond Company.

In further consideration of the premises aforesaid, the undersigned hereby guarantees the payment in full to the Home Bond Company, its successors and assigns, of the above named con-
27 tracts and open accounts in accordance with the terms indicated and appearing thereon.

—— ——. [SEAL.]
—— ——.

Accepted at Indianapolis, Indiana, ——, 19—.

HOME BOND COMPANY,
By —— ——, *Its* —— ——.

(This Contract is not binding on either party until accepted by Home Bond Company at Indianapolis, Ind.)

Report of Remittance Sheet No. 1, in re New England Chair Company referred to in above Pleading is as follows:

Report of Remittances.

New England Chair Co., Frankfort, Ky.

INDIANAPOLIS, March 9, 1911.

Sheet No. 1.

Disc't at	Date of Pchse.	Account of	Sched.	Rebate.	Serial No.	Amt. Invoice.	Amt. Rec'd.	Disc't & Allow'ce.	Rebate.
5/120.	3/7.	J. A. Barlow & Son	1	4	8459	3.00	....	....	....
		J. A. Barlow & Son	..	..	8461	6.35	9.25	.10	....
		Glasgow Install. Co.	..	..	8489	12.00	12.00	....	....
		S. Munter & Co.	..	..	8534	148.00	145.04	2.96	....
		W. O. Tucker Furn. Co.	..	..	8559	22.50	22.50	....	....
		A. Minis & Co.	..	..	8536	49.90	48.90	1.00	....
		F. R. Stuart & Co.	..	..	8737	17.76	17.40	.36	....
		Garner & Sharp	..	..	8648	30.70	30.09	.61	11.61
						290.21	285.18	5.03	11.61

Reserve	$58.04
Rebate	11.61
	$69.65
Discount	5.03
Check	$64.62

Enclosed please find check for $64.62 in full of above settlement.

Examined and found correct.

HOME BOND COMPANY.

GEO. SEIDENSTICKER.

4—948

H. V. MC CHESNEY, TRUSTEE, ETC.

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THIS PAGE IS BOUND VERTICAL IN BOOK

Certificate of Indebtedness Sheet No. 1, in re American Fibre Reed Company, referred to in above Pleading, is as follows:

American Fibre Reed Co.

Certificate of Indebtedness.

Number 1.

This is to Certify that the persons named below are indebted to the undersigned in the sums set opposite their respective names, for goods sold and delivered:

Date of bill.	Debtor.	Address.		Amount.
Nov. 17.	Central Furn. Co.,	Louisville, Ky.	19733	$6.50
Nov. 17.	Home Merchants Trading Ass'n,	Louisville, Ky.	19734	36.00
Nov. 17.	Dow Wire and Iron Works,	Louisville, Ky.	19735	15.00
Nov. 17.	McKeynolds, T. E.,	Clarksville, Tenn.	19736	15.00
Nov. 17.	Rowland, Geo. T.,	Lexington, Ky.	19737	14.00
Nov. 17.	Home Merchants' Trading Ass'n,	Indianapolis, Ind.	19738	36.00
28				
Nov. 17.	Chattanooga Chair Mfg. Co.,	Chattanooga, Tenn.	19739	89.25
Nov. 17.	Goessinger & Schaeffer,	New Britain, Conn.	19740	14.50
Nov. 17.	Battle & Lancaster,	Rocky Mountain, N. C.	19741	38.10
Nov. 17.	Graham & Johnson Bros.,	Fulton, Ky.	19742	32.57
Nov. 17.	Thweatt Furn. Co.,	Montgomery, Ala.	19743	19.30
Nov. 16.	Cable & Drake,	Campton, Ky.	19744	47.42
Nov. 16.	Church, Milton,	Nonn, Ky.	19745	23.26
Nov. 16.	Barr, Jno.,	Lebanon, Ky.	19746	10.20
Nov. 16.	Gowdy, D.,	Campbellsville, Ky.	19747	15.50
Nov. 16.	Harrell, L. W. & Co.,	Dawson, Ky.	19748	53.47
Nov. 16.	White, R. H. & Co.,	Covington, Tenn.	19749	103.00
Nov. 16.	Bading & Sanders,	Sonora, Ky.	19750	5.50
Nov. 16.	Knight, L. B.,	Cleaton, Ky.	19751	5.50
Nov. 16.	Huntsman, R. C.,	Scottsville, Ky.	19752	8.25
Nov. 16.	Sears Bros.,	Cleaton, Ky.	19753	13.83
Nov. 16.	Montgomery, S. E.,	Providence, Ky.	19754	8.25
Nov. 17.	Shelbyville Furn. Co.,	Shelbyville, Ky.	19755	16.50
				$626.90
		75%		$470.18
		Service, 5		31.34
		Reserve, 20		125.38
		Check		470.18
				$626.90

(This Contract is not binding on either party until accepted by Home Bond Company at Indianapolis, Ind.)

(N. B.—All Bills of Lading and Express Receipts shall accompany enclosed Statements of Accounts.)

Dated at Frankfort, Ky., this 18th day of November, 1911.

For and in consideration of the sum of Four Hundred and Seventy and 18-100 Dollars ($478.18), to the undersigned in hand paid, the receipt whereof is hereby acknowledged, the undersigned hereby sells, assigns and transfers to Home Bond Company, a corporation, all right, title and interest in and to the contracts and open accounts above named, including the right of stoppage in transitu, either in its own name or in the name of the undersigned (provided, however, the Home Bond Company shall not be charged with negligence in not making stoppage in transitu in any case, unless thereunto requested by the undersigned) and the invoices, which amount to Six Hundred Twenty-six and 90-100 Dollars ($626.90), are herewith delivered to Home Bond Company at Indianapolis, Indiana. The undersigned guarantees that the balances due on said contracts and open accounts are correctly set out in the above schedule thereof, and that full deliveries have been made on all said contracts and open accounts in accordance with the specifications of the buyer; that there is no contra account against any of them; that the amounts due on said contracts and open accounts, as set out in said schedule, are not disputed by the debtor, are not past due; that there are no offsets against said accounts or any of them, for freight, drayage or other carrying charges, commissions, damages or any other counterclaims of any nature whatsoever, but the amount set out in each item of said schedule is not and the payment of said item or items is not contingent on the fulfillment of any contract, past or future, and that entries have been made on our books disclosing the absolute sale thereof to Home Bond Company.

In further consideration of the premises aforesaid, the undersigned hereby guarantees the payment in full to the Home Bond Company, its successors and assigns, of the above named con-
29 tracts and open accounts in accordance with the terms indicated and appearing thereon.

AMERICAN FIBRE REED COMPANY, [SEAL.]

By —— ——, *Assistant Secretary.*

HOME BOND COMPANY,

By —— ——, *Its* —— ——.

Accepted at Indianapolis, Indiana, November 20, 1911.

Report of Remittance Sheet No. 1, in re American Fibre Reed Company referred to in above Pleading, is as follows:

Report of Remittances.

American Fibre Reed Co., Frankfort, Ky

INDIANAPOLIS, December 15, 1911.

Sheet No. E-1.

Disc't at	Dateof Pchse.	Account of	Sched.	Re-bate.	Serial No.	Amt. Invoice.	Amt. Rec'd.	Disc't & Allow'ce.	Re-bate.
5/120.	11/20.	Dow Wire & Iron Co	1	3	19735	15.00	14.70	.30	....
		Graham & Johnson Bros	..	..	19742	32.57	31.87	.70	1.43
	11/22.	Wadlington Hardware Co	2	3	19811	17.08	16.74	.34	....
		E. L. Norwood Co	..	..	19808	29.40	28.81	.59	1.62
		D. D. Pafford	..	..	19815	7.50	7.35	.15	....
	11/24.	H. C. Woodson	4	3	19935	34.70	34.00	.70	1.04
	11/27.	W. D. Gover	5	3	20026	23.25	22.67	.58	.70
	11/27.	B. A. Jacobs Co	6	3	20008	9.60	7.89	1.71	.29
	12/4.	Ballard & Ballard	9	4	20321	75.00	72.53	2.47	....
		J. T. Mustain	..	..	20319	11.25	11.02	.23	3.45
	12/8.	E. H. Kenner	12	4	20458	8.25	8.09	.16	.33
						263.60	255.67	7.93	8.86

Reserve	$52.72
Rebate	8.86
	$61.58
Discount	7.93
	$53.65

Enclosed please find check for $53.65 in full of above settlement.
Examined and found correct.

HOME BOND COMPANY.
F. M. THOMSON.

30 *Answer in re New England Chair Company, Bankrupt.*

Filed January 17, 1913.

The respondent, H. V. McChesney, Trustee, for the New England Chair Company, for answer to the intervening claimant's petition of the Home Bond Company of Indianapolis, Indiana, heretofore filed herein, states that he denies that, by the contract dated March 6, 1911, and filed with said intervening petition, the Home Bond Company agreed to buy, and did buy, from said New England Chair Company, the accounts referred to in said petition, or any of them, or agreed to pay, or did pay, therefor the face value thereof, less certain discounts mentioned in the petition, or any other sum.

He denies that said Home Bond Company became, or is, the owner of said accounts, or any of them, from, and after, the date set up in said petition, or at all.

He denies that said accounts, or any of them, were, or are, the property of said Home Bond Company. He denies that he has no right to the sum of $2,547.57 mentioned in the petition, or any part thereof. He denies that said moneys, or any part thereof is the absolute property, or any property, of the said Home Bond Company, or that it is entitled to same, or to receive same, or any other moneys from this respondent.

He admits the execution of the contract dated March 6, 1911, and filed with the intervening petition. He says, however, that said contract, while in terms a contract for sale of certain accounts due the New England Chair Company to the Home Bond Company, it was, in substance and effect and in fact, a contract whereby the Home Bond Company agreed to loan and advance to the New England Chair Company a sum not exceeding 75% of the face value of such accounts due the New England Chair Company, as might be agreed upon between the parties to said contract; all of said accounts due said New England Chair Company being accounts maturing 120 days from their respective dates; and as a consideration for such lending and advancing of money to the New England Chair Company by the Home Bond Company, the Home Bond Company was to receive 5% of the face value of said accounts as an interest charge upon said loan; that under said contract, and the construction placed thereon by the parties thereto, and the course of dealing between said parties pursuant to said contract, the Home Bond Company

31 was, from time to time, furnished by the New England Chair Company with statements showing accounts due the New England Chair Company from various persons purchasing goods of it, which statements showed the date of the respective accounts; the names and residences of the respective debtors, and the amounts of the respective accounts; and that, upon the furnishing of such statement, the Home Bond Company paid over to the New England Chair Company an amount of money equal to 75% of the total amount of the face value of the accounts embraced in such statement; that thereafter upon the maturity of each of said accounts it would be

collected by the New England Chair Company through one of its agents and representatives employed and paid by it; and the amount so collected would be remitted to the Home Bond Company. The Home Bond Company would then deduct, from the amount remitted to it, the 75% of the face value of such account which had been theretofore paid by it to the New England Chair Company; and in addition thereto would deduct 5% of the face of said account as, and for, "service" charge, and would then return to the New England Chair Company, the remaining 20% of the amount so remitted to the Home Bond Company. In the event, however, any of said accounts should prove to be uncollectable, the New England Chair Company was required to pay back, or make good, to the Home Bond Company, the face value of said account, less 20%. The amount so paid back, or made good, embracing the 75% of the face of such account advanced to the New England Chair Company by the Home Bond Company, and the 5% "service" charge made for such advancement.

It states that the business under said contract was thus conducted by the parties thereto up until, and after, the filing of the petition in bankruptcy against the New England Chair Company, and until the qualification of the respondent as custodian of the estate of the New England Chair Company on April 9, 1912; that after the filing of the petition in bankruptcy herein, the Home Bond Company sent notices to the various persons owing accounts to the New England Chair Company, directing such persons to pay the accounts owing by them to the Home Bond Company, and that pursuant to said notice some of the persons owing accounts to the New England Chair Company did pay their accounts direct to the Home Bond
32 Company. The respondent says that he is not now able to state the amount of money so collected by the Home Bond Company.

He states that after his qualification as custodian of the estate of the New England Chair Company, he proceeded as such custodian to, himself, collect accounts upon which money had been advanced by the Home Bond Company, as above stated, and that he has collected of such accounts a total of $2,571.37.

He states that, prior to the filing of the petition in bankruptcy herein, the Home Bond Company did not collect any of the accounts upon which it had advanced money, as above stated, and that the "service" charge of 5%, above referred to, was, and is, retained by the Home Bond Company, upon accounts collected prior to the qualification of the custodian, and is now claimed by the Home Bond Company, upon accounts collected by the custodian since his qualification, solely and only as an interest charge for money loaned on said accounts, and is, to the extent that such "service" charge *exceeding* 6% per annum interest on moneys advanced, usurious. He states that the said contract was, and is, a contract made and to be performed in the State of Kentucky.

He states that, by virtue of said contract, and under the laws of this State, the Home Bond Company is entitled to an interest charge of 6% per annum upon the money so loaned and advanced by it to

the New England Chair Company, and is not entitled to any greater charge of interest thereon; that said accounts were assigned or pledged by the New England Chair Company to the Home Bond Company solely and only for the purpose of securing the repayment to it of sums of money advanced by it to the New England Chair Company from time to time together with the legal rate of interest thereon; and that such assignment, or pledge, was never recorded in the office of the Franklin County Court Clerk, or in any other office of public record.

He states that he is not at this time able to say just what amounts of money have been advanced from time to time by the Home Bond Company to the New England Chair Company, or at what dates such advancements were made, or at what time, or times, or in what amounts repayments on account of said loan were made by the New England Chair Company to the Home Bond Company. He states, however, that he is informed and believes and charges it to be true
33 that upon a settlement of accounts, between the New England Chair Company and the Home Bond Company, upon a proper and legal basis, it will be ascertained that the Home Bond Company is indebted to the New England Chair Company in a large amount of money, instead of the New England Chair Company, or its Trustee, being indebted in any amount, as charged in the intervening petition herein, to the Home Bond Company.

He offers, as far as he is able, to produce for examination, all books, data, papers and memoranda in his custody as Trustee of the New England Chair Company, and bearing upon the matters at issue between the petitioner and Respondent herein, and he states that, in order to ascertain the true statement of account, it will be necessary for the Home Bond Company, the petitioner herein, to be required to produce all data, papers, memoranda and books of account in its possession, and referring to the transactions between it and the New England Chair Company.

Wherefore, the Respondent asks that said Home Bond Company be required to produce herein all data, papers, memoranda and books of accounts now in its possession and referring to transactions between said company and the New England Chair Company both prior and subsequent to the filing of the petition in bankruptcy herein; and that it be adjudged that the moneys paid to the New England Chair Company by the Home Bond Company under said contract, were advancements, or loans, made to the New England Chair Company by the Home Bond Company, upon the dates when such moneys were respectively paid, and that said Home Bond Company is entitled to 6% per annum interest thereon from the times of said payments until the repayment of the moneys so advanced, and no more; and that the accounts between the Home Bond Company and the New England Chair Company and this Respondent be stated, and that in such statement, the Home Bond Company be required to account for all moneys collected by, or paid to, it from the time of the execution of said contract to the present date, and that it be required to pay over to this Respondent such sum, if any,

as may be found due from it, upon a statement of such account, for his costs herein expended, and for all proper relief.

H. V. McCHESNEY, *Trustee,*
By BODLEY & BASKIN,
BROWN & NUCKOLS,
Attorneys.

34 *Answer In re American Fibre Reed Company, Bankrupt. Filed January* 17, 1913.

The Respondent, H. V. McChesney, Trustee, for the American Fibre Reed Company, for answer to the intervening claimant's petition of the Home Bond Company of Indianapolis, Indiana, heretofore filed herein, states that he denies that, by the contract dated November 9, 1911, and filed with said intervening petition, the Home Bond Company agreed to buy, and did buy, from said American Fibre Reed Company the accounts referred to in said petition, or any of them, or agreed to pay, or did pay, therefor the face value, less certain discounts mentioned in the petition, or any other sum.

He denies that said Home Bond Company became, or is, the owner of said accounts, or any of them, from, and after, the dates set up in said petition, or at all.

He denies that said accounts, or any of them, were, or are, the property of said Home Bond Company. He denies that he has no right to the sum of $2,547.57 mentioned in the petition, or any part thereof. He denies that said moneys, or any part thereof, *is* the absolute property, or any property, of the said Home Bond Company, or that it is entitled to same, or to receive same, or any other moneys from this Respondent.

He admits the execution of the contract dated November 9, 1911, and filed with the intervening petition. He says, however, that said contract, while in terms a contract for sale of certain accounts due the American Fibre Reed Company to the Home Bond Company, it was, in substance and effect and in fact, a contract whereby the Home Bond Company agreed to loan and advance to the American Fibre Reed Company a sum not exceeding 75% of the face value of such accounts due the American Fibre Reed Company, as might be agreed upon between the parties to said contract; all of said accounts due said American Fibre Reed Company being accounts maturing 120 days from their respective dates; and as a consideration for such lending and advancing of money to the American Fibre Reed Company by the Home Bond Company, — was to receive 5% of the face value of said accounts as an interest charge upon said loan; that under said contract, and the construction placed thereon by the parties thereto, and the course of dealing between said parties pursuant to said contract, the Home Bond Company was, from time to

35 time, furnished, by the American Fibre Reed Company, with statements showing accounts due the American Fibre Reed Company from various persons purchasing goods of it, which statements showed the date of the respective accounts; the names and

residences of the respective debtors, and the amounts of the respective accounts; and that, upon the furnishing of such statement, the Home Bond Company paid over to the American Fibre Reed Company an amount of money equal to 75% of the total amount of the face value of the accounts embraced in such statement; that thereafter upon the maturity of each of said accounts it would be collected by the American Fibre Reed Company through one of its agents and representatives employed and paid by it; and the amount so collected would be remitted to the Home Bond Company. The Home Bond Company would then deduct, from the amount remitted to it, the 75% of the face value of such account which had been theretofore paid by it to the American Fibre Reed Company; and in addition thereto would deduct 5% of the face of said account as, and for, "service" charge, and would then return to the American Fibre Reed Company the remaining 20% of the amount so remitted to the Home Bond Company. In the event, however, any of said accounts should prove to be uncollectable, the American Fibre Reed Company was required to pay back, or make good, to the Home Bond Company the face value of said account, less 20%. The amount so paid back, or made good, embracing the 75% of the face of such account advanced to the American Fibre Reed Company by the Home Bond Company, and the 5% "service" charge made for such advancement.

It states that the business under said contract was thus conducted by the parties thereto up until, and after, the filing of the petition in bankruptcy against the American Fibre Reed Company, and until the qualification of the Respondent as custodian of the estate of the American Fibre Reed Company on April 9, 1912; that after the filing of the petition in bankruptcy herein, the Home Bond Company sent notices to the various persons owing accounts to the American Fibre Reed Company, directing such persons to pay the accounts owing by them to the Home Bond Company, and that pursuant to said notice some of the persons owing accounts to the American Fibre Reed Company did pay their accounts direct to the Home Bond Company. The Respondent says that he is not
36 now able to state the amount of money so collected by the Home Bond Company.

He states that after his qualification as custodian of the estate of the American Fibre Reed Company, he proceeded as such custodian to, himself, collect accounts upon which money had been advanced by the Home Bond Company, as above stated, and that he has collected of such accounts a total of $2,358.32.

He states that, prior to the filing of the petition in bankruptcy herein, the Home Bond Company, did not collect any of the accounts upon which it had advanced money, as above stated, and that the "service" charge of 5%, above referred to, was, and is, retained by the Home Bond Company, upon accounts collected prior to the qualification of the custodian, and is now claimed by the Home Bond Company upon accounts collected by the custodian since his qualifications, solely and only as an interest charge for money

loaned on said accounts, and is, to the extent that such "service" charge exceeds 6% per annum interest on moneys advanced, usurious. He states that the said contract was, and is, a contract made and to be performed in the State of Kentucky.

He states that, by virtue of said contract, and under the laws of this State, the Home Bond Company is entitled to an interest charge of 6% per annum upon the money so loaned and advanced by it to the American Fibre Reed Company, and is not entitled to any greater charge of interest thereon; that said accounts were assigned or pledged by the American Fibre Reed Company to the Home Bond Company solely and only for the purpose of securing the repayment to it of sums of money advanced by it to the American Fibre Reed Company from time to time together with the legal rate of interest thereon; and that such assignment, or pledge, was never recorded in the office of the Franklin County Court Clerk, or in any other office of public record.

He states that he is not at this time able to say just what amounts of money have been advanced from time to time by the Home Bond Company to the American Fibre Reed Company, or at what dates such advancements were made, or at what time, or times, or in what amounts repayment- on accounts of said loan were made by the American Fibre Reed Company to the Home Bond Company. He states, however, that he is informed and believes and charges it to be true that upon a settlement of accounts, between the
37 American Fibre Reed Company and the Home Bond Company, upon a proper and legal basis, it will be ascertained that the Home Bond Company is indebted to the American Fibre Reed Company in a large amount of money, instead of the American Fibre Reed Company, or its Trustee, being indebted in any amount, as charged in the intervening petition herein, to the Home Bond Company.

He offers, as far as he is able, to produce for examination all books, data, papers and memoranda in his custody as Trustee of the American Fibre Reed Company, and bearing upon the matters at issue between the petitioner and respondent herein, and he states that, in order to ascertain the true statement of account, it will be necessary for the Home Bond Company, the petitioner herein, to be required to produce all data, papers, memoranda and books of accounts in its possession, and referring to the transactions between it and the American Fibre Reed Company, including data, papers, memoranda and books of account referring to the transactions in connection with the accounts due the Chicago office of the American Fibre Reed Company.

The respondent states that in addition to the moneys advanced by the Home Bond Company to the American Fibre Reed Company upon the accounts referred to above, the Home Bond Company also made certain advancements of money, under said contract, to the American Fibre Reed Company, upon the faith and security of certain accounts due the American Fibre Reed Company, arising out of sales of property of that company made through its office in the city of Chicago, Illinois; that prior to the filing of the petition in

bankruptcy, the American Fibre Reed Company collected some of the accounts due its Chicago Branch, and turned over same to the Home Bond Company in the same manner and for the same purposes as stated above in reference to the accounts referred to in the intervening petition; and that after the filing of the petition in bankruptcy the Home Bond Company, itself, proceeded to collect the balance of the accounts due the Chicago office, and this respondent, as custodian, collected none of those accounts. He says that the Home Bond Company has never, in any way, accounted to him, either as custodian or Trustee, for the amounts of money so collected by it. He is unable at this time to state the amounts of money so advanced to the American Fibre Reed Company on security of the accounts due the Chicago office, or as to the dates of such
38 advancement; nor is he at this time able to state the amounts which have been repaid to the Home Bond Company on account of such advancement, or the dates of such repayment, or the amounts collected of said accounts by the Home Bond Company, since the filing of the petition in bankruptcy herein.

Wherefore, the respondent asks that said Home Bond Company be required to produce herein all data, papers, memoranda and books of accounts now in its possession and referring to transactions between said company and the American Fibre Reed Company both prior and subsequent to the filing of the petition in bankruptcy herein, and that it be adjudged that the moneys paid to the American Fibre Reed Company by the Home Bond Company under said contract, were advancements, or loans, made to the American Fibre Reed Company by the Home Bond Company, upon the dates when such moneys were respectively paid, and that said Home Bond Company is entitled to 6% per annum interest thereon from the times of said payments until the repayment of the moneys so advanced, and no more; and that the accounts between the Home Bond Company and the American Fibre Reed Company and this respondent be stated, and in such statement, the Home Bond Company be required to account for all moneys collected by, or paid to, it from the time of the execution of said contract to the present date, and that it be required to pay over to this respondent such sum, if any, as may be found due from it, upon a statement of such account; for his costs herein expended, and for all proper relief.

H. V. McCHESNEY, *Trustee,*
By BODLEY & BASKIN,
BROWN & NUCKOLS,
Attorneys.

39 *Response of Trustee to Amended Claimant's Petition.*

Filed January 17, 1913.

The respondent, H. V. McChesney, Trustee in bankruptcy for the American Fibre Reed Company, bankrupt, and for the New England Chair Company, bankrupt, for response to the amended claim-

ant's petition of the Home Bond Company, filed herein on December 16, 1912, and for amendment to the response of the said Trustee to the intervening claimant's petition of the Home Bond Company in the matter of the New England Chair Company, bankrupt, this day filed herein, and for amendment to the response of said Trustee to the intervening claimant's petition of the Home Bond Company in the matter of the American Fibre Reed Company, bankrupt, this day filed herein, states that he admits that the certificates of indebtedness filed as exhibits with the said amended claimant's petition correctly set forth the dates of the accounts; the names of the debtors; the address of the debtors, and the amount of the accounts upon which moneys have been advanced to the New England Chair Company and the American Fibre Reed Company by the Home Bond Company.

He also admits that the reports of remittances, filed with said amended claimant's petition, show the accounts upon which moneys were so advanced but have been since collected together with the dates of the collections, and the amounts of moneys retained by the Home Bond Company and the amounts of moneys returned by it to the New England Chair Company and the American Fibre Reed Company. He denies, however, that said certificates of indebtedness, or any of them, or reports of remittances, or any of them, mean that the Home Bond Company was buying from the New England Chair Company, or the American Fibre Reed Company, any of said accounts appearing on said exhibits, and he reiterates the statements in his responses this day filed, and says that these exhibits mean, as did the contracts between the parties, that the Home Bond Company was advancing money to the New England Chair Company, and American Fibre Reed Company, to the amount indicated by the exhibits, being 75% of the face value of the accounts appearing on the certificates of indebtedness.

He denies that the extra service referred to in said amended petition, consisting of a charge of 1-30 of 1% for each day that
40 an account ran over the time stipulated in the contract was pursuant to the contract or as contemplated thereby.

He denies that the claimant was compelled to pay to E. Manning, during the year 1912, the sum of $100, or any other sum, on each of the following dates, to-wit: March 16th, April 6th, May 7th, June 7th, July 8th, August 12th and October 7th, or any of said dates, or at all. He states that from the time of the filing of the petition in bankruptcy February 2, 1912, until the custodian of the bankrupts took charge of their estates on April 9, 1912, the said E. Manning was in the employ of the American Fibre Reed Company, as he had been theretofore and during all of that time received his salary as such employee in full, with an exception of about two weeks, and that such salary, so received by him, was the salary that had been paid him theretofore by the said American Fibre Reed Company, and for which salary he had discharged the duties of attending to the collection of the accounts assigned to the Home Bond Company under the said contracts, and of making remittances of the amounts so collected to the Home Bond Company as well as discharging other duties inci-

dent to his employment by the American Fibre Reed Company; that since the 9th day of April, 1912, the said E. Manning has been in the employ of H. V. McChesney, custodian of the bankrupts' estates, as his clerk, and has been in the employ of H. V. McChesney, Trustee of said estates, as clerk, since his qualification as Trustee; that since the appointment of the custodian on April 9, 1912, such services of said Manning as rendered in collection of said accounts, or any of them, has been services rendered as clerk of the Custodian and Trustee, and for which he has been paid out of said estates; that such collections on said accounts as have been made since the Custodian took charge of the estates have been made by the Custodian, himself, and in his name, with the exception of such sums as have been collected by the Home Bond Company, itself, since that date. He states that, upon the filing of the petitions in bankruptcy and the qualification of the Custodian, the rights of the parties to further carry out the contracts referred to herein, were at an end, except in so far as might be necessary to wind up the affairs under said contracts. He denies that the claimant has any right, under its contracts referred to, or in any other behalf, to charge any of the money so
41 paid said Manning, if it did pay him anything, against the moneys in its hands belonging to said bankrupts.

He states that, referring to the items of expense of collection charges, court costs, and other expenses incurred in the matter of the collection of any of said accounts, upon the qualification of the Custodian, above referred to, the right to collect said accounts passed to him, and that such expenditures as were made by the claimant after April 9, 1912, were unauthorized, and the claimant has now no right to set up such expenses as against the funds in its hands belonging to the bankrupt estates.

He denies that the claimant has any right to hold, or any lien upon, or right to collect, such of the accounts referred to in the said certificates of indebtedness as are still outstanding and uncollected, for the reason that the lien given it by said contracts upon said accounts was never of record, and upon the filing of the petition in bankruptcy herein and the qualification of the Trustee the right to collect said accounts passed to him free from any claim of the claimant. He denies that the funds now in claimant's hands belonging to said bankrupts are subject to the charges of the payments of court costs, expenses, attorneys' fees or stenographers' charges that may be expended in the collection of uncollected accounts.

He denies that the claimant is entitled to charge against said fund the fees which it may incur in the matter of the services of its attorneys herein. He denies that, under the contracts referred to, it was contemplated that the claimant ought to be paid its counsel fees whenever it was compelled to employ counsel in order to recover such accounts, or that said right was not made dependable upon the person upon whom it was compelled to seek a recovery of said accounts. He says that this proceeding is not in effect an effort to recover said accounts, or any of them. He denies that under said contracts the claimant has the undoubted, or any right to charge against said funds such fees as may be charged it by its attorneys in this proceeding.

He denies that the said contracts were executed or made in Indianapolis, Indiana, or that they are Indiana contracts, or governed by the laws of Indiana. He states that he has no knowledge or information sufficient upon which to form a belief, and therefore de-
42 nies that the laws of the State of Indiana permit attorneys' fees to be recovered in instances, such as the one at bar.

He states that, as appears from the certificates of indebtedness filed as exhibits with the said amended petition, the accounts assigned to the claimant by the New England Chair Company total $109,423.98, and that on said accounts the Home Bond Company advanced to the New England Chair Company the sum of $82,067.98; that the total net amount of service charged by the Home Bond Company on said accounts, said service being the money retained by it by way of service or interest charge upon the said amount advanced by it, totals $4,128.96, and that said service of $4,128.96 retained by the Home Bond Company represents an interest charge of 24% per annum upon amounts advanced or loaned by it on said account. He states that, under the laws of the State of Kentucky, the Home Bond Company is not entitled to receive or retain exceeding 6% per annum on the moneys so advanced or loaned by it, and that under the law of the State of Indiana the legal rate of interest on money loaned is 6% per annum, and that, while parties may contract for an interest charge of 8%, in the event a rate exceeding 8% is contracted for, or attempted to be retained, the extent to which such contract, or retention, exceeds 6% per annum, is forfeited as usury. He states that the matters of account between said bankrupts and the Home Bond Company constituted a running account, and that the amounts due the one from the other were not properly to be ascertained until the determination of the contracts between them.

He, therefore, states that the amount of service retained by the Home Bond Company, to-wit: $4,129.98, being an interest charge at the rate of 24%, is four times interest charge that should have been made, and retained by it, and that the sum retained by the Home Bond Company on account of advances made by it should not have exceeded the sum of $1,032.24 making an excess amount of $3,-$96.72 retained by it on account of advances made to the New England Chair Company. He states that in addition to this item the Home Bond Company has retained, and now has in its hands, and due the New England Chair Company, the sum of $978.64, being the amount of reserve due the New England Chair Company on accounts collected by the Home Bond Company, as appears from the reports of remittances attached to the amended petition herein.
43 These two items making a total of $4,075.36 retained by the Bond Company and belonging to the New England Chair Company.

That as against this sum due from the Home Bond Company to the New England Chair Company, the Home Bond Company is entitled to 75% of $2,845.88, the latter sum being the face amount of the accounts collected by the Custodian and Trustee, and upon which the Home Bond Company had loaned 75%, amounting to $2,134.41, together with 6% interest thereon for the average time of one year,

amounting to $128.06, and making a total of $2,262.47 due the Home Bond Company on this account; that in addition to this item, the Home Bond Company is entitled to three-fourths of the sum of $2,364.34, being the amount of the New England Chair Company accounts still outstanding and uncollected, and upon which the Home Bond Company had advanced 75%, amounting to $1,698.24 and upon which the Home Bond Company is also entitled to 6% interest for an average time of seven months, amounting to $59.44, making a total credit of $1,757.68 due the Home Bond Company on this account; that said two items of credit due the Home Bond Company, as above set out, to-wit: $2,262.47 and $1,757.68, making a total of $4,020.15 to be applied as a credit upon the sum of $4,075.36 due the New England Chair Company from the Home Bond Company, as above set out, leaving a balance of $53.21 due the Trustee of the New England Chair Company from the Home Bond Company on account of the transactions growing out of the contract between the New England Chair Company and the Home Bond Company.

He states that under the contract between the Home Bond Company and the American Fibre Reed Company there were assigned by the latter company to the former, as appears from the certificates of indebtedness attached to the amended petition, accounts totaling $18,045.76; that on said accounts the Home Bond Company advanced to the American Fibre Reed Company 75% of the face value thereto, to-wit: $13,524.32; that the total net amount of the service charged and retained by the Home Bond Company on account of such advancements, amounts to $679.35, the said service so retained being at the rate of 24% per annum on the amount so advanced; that for the reasons above stated, the Home Bond Company is not entitled to charge, or to receive, exceeding 6% per annum on the amount so advanced, amounting to $169.84, and that the
44 amount retained by the Home Bond Company by way of service charge exceeds the amount which it should have retained on that account by the sum of $509.52, which amount is due the American Fibre Reed Company from the Home Bond Company; that in addition to this amount the Home Bond Company has retained, and now has in its hands, the sum of $1,265.38, being the reserve due the American Fibre Reed Company on accounts collected by the Home Bond Company, and that these two items make a total of $1,774.90 owing to the American Fibre Reed Company from the Home Bond Company; that as against this amount the Home Bond Company is entitled to a credit of 75% of the sum of $2,409.25, the latter sum being the face amount of accounts assigned by the American Fibre Reed Company to the Home Bond Company and collected by the Custodian and Trustee; said 75% amounting to $1,806.93, and the Home Bond Company is entitled to 6% interest on said amount for the average time of one year, amounting to $108.41, making a total credit due the Home Bond Company on this account of $1,915.34; that in addition to that amount the Home Bond Company is entitled to a credit of 75% of $616.56, the latter sum being the amount of the uncollected accounts assigned by the American

Fibre Reed Company to the Home Bond Company, and not yet collected; said 75% amounting to $462.42, upon which amount the Home Bond Company is entitled to 6% interest for the average time of seven months amounting to $16.18, making the total credit of the Home Bond Company on this account $478.60; that the two items of credit due the Home Bond Company from the American Fibre Reed Company, to-wit: $1,915.34 and $478.60, total $2,393.94, from this amount is to be deducted the amount of $1,774.90 due the American Fibre Reed Company from the Home Bond Company, as above set out, leaving a balance due the Home Bond Company from the American Fibre Reed Company of $619.04, from this amount is to be deducted the sum of $53.21 due the New England Chair Company from the Home Bond Company, as above set out, leaving a balance of $565.83 due from the Trustee of the two estates to the Home Bond Company. The Trustee admits that he is indebted to the Home Bond Company in said sum of $565.83, but denies that he is indebted to it in any other sum in excess of that amount, or in any other amount whatever, and he states that he is entitled to collect and have paid over to him all of the outstanding and uncollected accounts which were assigned to the Home Bond Company under said contracts, or either of them, inasmuch as in a foregoing statement he has accounted to the Home Bond Company for the full amount advanced by it on such unpaid accounts together with the legal interests thereon. He reiterates all of the allegations of his original response, except such, if any, as are inconsistent herewith.

Wherefore, having fully answered, he prays that no judgment be entered requiring him to pay the said Home Bond Company any sum in excess of the $565.83 above set out, as being due it from him, and that it be adjudged that he, as Trustee of said bankrupts, is entitled to collect the outstanding and unpaid accounts due the said bankrupts, and to retain such amounts as may be collected thereon free from all claim of the Home Bond Company and that the Home Bond Company be enjoined and restrained from further interfering with him in the collection of said accounts and from attempting to collect some, or any of them.

BODLEY & BASKIN,
BROWN & NUCKOLS,
Attorneys for Trustee.

Agreed Statement of Facts.

Filed February 4, 1913.

For the purposes of the hearing of the matters arising upon the pleadings herein, the following statement of facts is agreed upon between the Home Bond Company and the Trustee of the above-named bankrupts, to-wit:

(1) That the contract attached to the intervening petition of the Home Bond Company, dated March 6, 1911, is a true copy of the

contract between the New England Chair Company and the
46 Home Bond Company, and that the contract filed with the intervening petition, and dated November 9, 1911, is a true copy of the contract between the American Fibre Reed Company and the Home Bond Company.

(2) That in the carrying out of the contract between the New England Chair Company and the Home Bond Company from the 6th day of March, 1911, to the 9th day of November, 1911, and of the contract between the American Fibre Reed Company and the Home Bond Company from November 9, 1911, until the filing of the involuntary petitions in bankruptcy herein, on February 2, 1912, the New England Chair Company, from said 6th day of March, 1911, to November 9, 1911, and the American Fibre Reed Company, from November 9, 1911, to the filing of the said petitions herein on February 2, 1912, from time to time, mailed to the Home Bond Company at Indianapolis, Indiana, lists or statements showing accounts due the company sending the statement. Said lists showed the respective dates of the bills, the names of the debtors, the addresses of the debtors, and the amounts of the respective accounts. When such lists or statements were received by the Home Bond Company, it inspected them, and upon such of said accounts as were acceptable to it, it thereupon paid to the company sending the list 75% of the face of the accounts appearing on the lists, and which were acceptable to the Home Bond Co. The accounts appearing on said lists, which were acceptable to the Home Bond Co., and upon which it had paid 75% of the face value, were stamped upon the books of the company sending the lists, to the effect that the accounts so stamped had been sold to the Home Bond Company, and itemized statements of such accounts were delivered to the Home Bond Company. That thereafter, upon the maturity of each account upon which the Home Bond Company had paid the 75% of the face thereof, or whenever it was able to do so, the company to whom the account was due, through E. Manning, the attorney in fact named in the respective contracts, collected said accounts; and, upon the colletion thereof, he remitted the entire amount collected to the Home Bond Company. The Home Bond Company then retained out of the amount so remitted the 75% paid upon the account by it, and in addition thereto retained a service charge, as follows, to-wit:

1% upon the face of an account paid within 15 days.
2% upon the face of an account paid within 30 days.
47 3% upon the face of an account paid within 60 days.
4% upon the face of an account paid within 90 days.
5% upon the face of an account paid within 120 days.
6% upon the face of an account paid within 150 days.
7% upon the face of an account paid within 180 days.

and thereafter, at the same increase in the service charge retained, to-wit:

An increase equivalent to 1% for each 30 days that the payment of the account was delayed. That all of said accounts were accounts

maturing 120 days from date, though said accounts were collected at various intervals—some before and some after maturity; that after retaining 75% paid and the service charge above indicated, the Home Bond Company then remitted back to the company in whose favor the account was created the balance of the proceeds of its collection. That the E. Manning referred to as attorney in fact was, during the continuance of the contract with the New England Chair Company, the assistant Treasurer and one of the acting bookkeepers of the New England Chair Company, and during the existence of the contract with the American Fibre Reed Company he was the Assistant Secretary and one of the bookkeepers of that company; that, during the existence of the contract with the New England Chair Company, said Manning was paid a regular salary by that company as said assistant Treasurer and bookkeeper, and was not paid anything in addition by that company for collecting said accounts or making remittances to the Home Bond Company; and that from November 9, 1911, until April 9, 1912, when the custodian took charge of the estates of the bankrupts, he was paid a regular salary as Assistant Secretary and bookkeeper of the American Fibre Reed Company by that company, with the exception of two weeks prior to April 9, 1912, his said salary for said two weeks not having yet been paid him by that company; and that he was not paid anything in addition to his salary by the American Fibre Reed Company for attending to the collection of the accounts above referred to or making remittances to the Home Bond Company.

(3) That from April 9, 1912, until the qualification of the Trustee, on September —, 1912, said Manning was in the employ of the custodian as clerk, at a salary which has been paid him out of the bankrupt estates, and that from September —, 1912, until January —, 1913, he has been in the employ of the Trustee as clerk, at a salary paid him out of the estates of the said bankrupts.

48 (4) That the certificates of indebtedness filed with the amended petition of the Home Bond Company show correctly the dates, names and addresses of the debtors, and the face amounts of the accounts due the New England Chair Company and American Fibre Reed Company, upon which the Home Bond Company has paid to the said New England Chair Company and American Fibre Reed Company, respectively, 75% of the face amount thereof, and on the statements referred to in No. 2 hereof.

(5) That the face of said accounts due the New England Chair Company total $109,423.98, upon which the Home Bond Company paid to the New England Chair Company 75% thereof, amounting to $82,067.98.

(6) That the total of the face of such accounts due the American Fibre Reed Company is $18,045.76, and that upon those accounts the Home Bond Company paid to the American Fibre Reed Company 75% thereof, amounting to $13,534.32.

(7) That the reports of remittances attached to the amended petition of the Home Bond Company correctly show the date of purchase, the name of the debtor, and the amount collected and remitted to the Home Bond Company, and the date of collection upon

accounts which were collected through E. Manning, and the amount of service charge retained by the Home Bond Company on the account so collected.

(8) That the total amount of service charge retained by the Home Bond Company on accounts so collected, which were due the New England Chair Company, amounts to $4,128.96.

(9) That the amount of service charge retained by the Home Bond Company, on accounts so collected, which were due the American Fibre Reed Company, amounts to $679.35.

(10) That the amounts so retained as a service charge, above stated in Nos. 8 and 9, are equal in amount to an interest charge of at least 24% per annum on the money paid on each respective account from the time of such payment to the time of the collection of the account and its remittance to the Home Bond Company.

(11) That the Home Bond Company has now in its hands the sum of $978.64, being the amount of the reserve due, under the terms of the contract with the New England Chair Company, on accounts collected by the Home Bond Company, and that the Home Bond Company has in its hands the sum of $1,265.38, being
49 the amount of reserve due, under the terms of the contract with the American Fibre Reed Company, on accounts collected by the Home Bond Company.

(12) That the face of the accounts collected by the Custodian and Trustee since he took charge of the estates, due the New England Chair Company, amounts to $2,845.88, and that the face of the accounts due the American Fibre Reed Company, collected by the Custodian and Trustee since he took charge of the estates, amounts to $2,409.25.

(13) That there are still outstanding and uncollected of such accounts due the New England Chair Company the sum of $2,364.34, and that there are still outstanding and uncollected of such accounts due the American Fibre Reed Company the sum of $616.56.

(14) That the said contracts were signed in the State of Kentucky by the New England Chair Company and the American Fibre Reed Company, respectively, and by the sureties upon the bonds attached to the respective contracts. After being so signed, they were sent to Indianapolis, Indiana, and there signed by the Home Bond Company. That the facts in reference to the execution or the carrying out of the contracts are as set out above in No. 2.

(15) That the following is a copy of the statutes of the State of Indiana relating to interests that may be charged, and to usury:

7950—Rate. SECTION 1. The interest on loans or forbearance of money, goods or things in action, when the parties do not agree on the rate, shall be Six Dollars a year on One Hundred Dollars, and at that rate for a greater or less sum, or for a shorter or longer time; but it may be taken yearly, or for a shorter period in advance. No agreement to pay a higher rate shall be valid unless the same be in writing, signed by the party to be charged thereby; and, in such case, it shall not be lawful to contract for more than 8% per annum.

7953—Usury, Recoupment. SECTION 4. When a greater rate of interest than is hereby allowed shall be contracted for, the contract shall be void as to the usurious interest contracted for; and, in an action on such contract, if it appears that a higher rate than 8% has been directly or indirectly contracted for, the excess of interest over 6% shall be deemed usurious and illegal, and in an action on a contract affected by such usury the excess over the legal interest may be recouped by the debtor whenever it has been reserved or paid before the bringing of the suit.

(16) That, prior to the filing of the petitions in bankruptcy herein on February 2, 1912, the Home Bond Company did not, itself, undertake to collect, or collect, any of the accounts due either the New England Chair Company or the American Fibre Reed Company, but that, after those petitions were filed, the Home Bond Company did undertake to, itself, collect the accounts still outstanding and uncollected, and as a result of such efforts has collected some of said accounts, from which source it has obtained the amounts of $978.64 and $1,265.38 above referred to in No. 11 as representing the reserve due the New England Chair Company and American Fibre Reed Company.

(17) That, from March 16, 1912, to October 7, 1912, the Home Bond Company paid to said E. Manning the sum of $100.00 per month, amounting in all to the sum of $800.00; that, from March 18, 1912, to November 12, 1912, the Home Bond Company paid out for telegrams, printing, attorneys' fee, expenses and court costs, a sum totaling $140.34, as appears from the statement of the amended petition of the Home Bond Company in its efforts to collect said accounts.

(18) That, at the time of the execution of the contract of March 6, 1911, the New England Chair Company was without working capital, and was in need of ready money with which to pay the expenses incident to carrying on its business; that on November 9, 1911, the American Fibre Reed Company was without working capital, and was in need of ready money with which to meet the expenses incident to carrying on its business; that at said times said two companies represented to the Home Bond Company that they were solvent.

(19) That there may be read as evidence herein the two contracts referred to in No. 1 hereof, and the certificate of indebtedness sheets, and the report of remittances sheets referred to herein, and filed as exhibits with the amended intervening petition herein.

H. V. McCHESNEY, *Trustee,*
By BROWN & NUCKOLS AND
BODLEY & BASKIN.
DUFFIN, SAPINSKY & DUFFIN,
Attorneys for Home Bond Company.

51 *Opinion of D. W. Lindsey, Special Master.*

Filed March 10, 1913.

The Home Bond Company, by its Intervening Petition filed in the above-styled proceedings in Bankruptcy pending in this Court, asserts claim, as the owner, of certain sums of money alleged to be in the hands of H. V. McChesney, the Trustee of said bankrupt estates, which claim is contested by the Trustee.

The contention of the Intervening Petitioner is that, under the terms and provisions of two certain contracts with the said bankrupt corporations respectively, the one with the New England Chair Company, dated March 6, 1911, and the other with the American Fibre Reed Company, dated November 9, 1911, it bought from each of said corporations certain accounts owing to the corporation, and that these bankrupt proceedings, having been instituted by the petitions filed February 2, 1912, and said H. V. McChesney having been by order of this Court appointed Custodian and afterwards the Trustee of the said bankrupt estates, he proceeded to, and did collect, certain of the accounts so alleged to have been purchased by the petitioner from the bankrupt corporations respectively, and now has the money so collected by him in his possession as Trustee as aforesaid. That the purchases of such accounts by the petitioner from the New England Chair Co. were between the dates of April 26, 1911, and November 16, 1911, inclusive; and from the American Fibre Reed Company between November 18, 1911, and January 24, 1912, inclusive, and that the amounts of such accounts so collected by the Custodian and Trustee from the New England Chair Company accounts was $2,571.37, and from the American Fibre Reed Company accounts was $2,358.32.

The defense interposed by the Trustee rests primarily upon the contention that the transactions between the petitioner and the bankrupt corporation, respectively, were not the buying by the former from the latter of the accounts, but were in substance and effect, and, in fact, nothing more or less than the pledging of the accounts by the latter to the former for a loan, in each instance, of a certain per cent. of the face value of the accounts, and at the usurious rate of not less than twenty-four per cent. per annum interest, with the right and duty retained and devolved upon the bankrupt corporations in their own names, and at their expense, to collect the accounts,
52 the proceeds in each instance to be applied, first to the payment of the amount advanced and loaned by the petitioner to the bankrupt, and the stipulated interest thereon, and the "remainder" of the amounts collected being the property of and to go to the bankrupt corporation, or for its benefit. That the petitioner has, since these proceedings in bankruptcy were instituted, itself collected a number of said accounts, and now has in its hands the money arising from such collections amounting to $—, and also has a large number of the accounts uncollected, amounting to $—. And that if a settlement of the transactions is made between the peti-

tioner and the bankrupt corporations, or the Trustee, under the said contracts, upon a legal and equitable basis, and purged of usury, but a very small sum, if anything, will be coming to the petitioner upon the surrender to the Trustee of all uncollected accounts.

The two contracts, copies of which are exhibited, are upon printed forms, are identical in every respect, except as to their dates, and that the one is with the New England Chair Company and the other with the American Fibre Reed Company; and it was admitted by counsel for both parties in the argument, and is practically stated in the agreed facts, that in each instance of the alleged purchase of accounts by the Intervening Petitioner from the bankrupt corporations the transactions were had and made under the terms and conditions of said contracts respectively.

The case is submitted to the Special Master upon the pleadings and exhibits and the agreed statement of facts filed, with the agreement in writing filed that the affirmative matter contained in the Trustee's Response to the Intervening Petition and Amended Petition is controverted of record, and after argument by counsel.

The question first to be considered is whether the transactions had between the Intervening Petitioner and the bankrupt corporations, under the contracts exhibited, were sales by the bankrupts to the petitioner of the accounts involved, or in the nature of pledges of such accounts as security for monies advanced or loaned thereon to the bankrupts.

The following cases cited in the brief of counsel for the Trustee, to-wit:

Bright vs. Wagle, 3 Dana 252,
Boli, Sr., vs. Irwin & Son, 21 Ky. L. R. 367,
McKibbin vs. Delg, 128 S. W. 1083-5-6,

53 are in point as illustrative of the extent to which the Courts have gone in holding that an instrument purporting on its face to be a deed or bill of sale is, in effect, in the nature of a mortgage or as security, and not a sale. And that the Courts will penetrate devices used to cover up or conceal usury is well illustrated by the case of Missouri Valley Life Ins. Co. vs. Kettle, 2 Fed. 113, where, quoting from the syllabus, it is said:

"Any agreement, device or shift to reserve or take more than the law permits for use of money loaned is usury, and whether by such means more than the legal rate of interest has been contracted for, is a question of fact to be collected from the whole of the transactions as it passed between the parties."

As was said by the Kentucky Court of Appeals in Edrington vs. Harper, 3 J. J. M. 354, "It is often very difficult to discriminate between mortgages and conditional sales. Every case must be determined by a consideration of its own peculiar circumstances; and it is proper that no specific rules should be defined for distinguishing mortgages from conditional sales; otherwise the usurer, with the rules before him, would be able to evade the laws against usury, and oppress the necessitous with impunity."

And again, on page 355: "The intention of the parties is the only true and infallible test; that is to be collected from the condition or

conduct of the parties, as well as from the face of the written contract."

And again: "The fact that the real transaction between the parties was a borrowing and lending will, whenever or however it shall appear, show that a deed, absolute on its face, was intended as a security for money; and whenever it can be ascertained to be a security for money it is only a mortgage, however artfully it may be disguised."

To the same effect in substance is the ruling of the Court in Baldwin vs. Crow, 86 Ky. 679. And that such rules apply for the construction of the contracts in question cannot well be doubted.

To distinguish a sale from other transfers of property, it is said in Cyc., Vol. 35, page 27:

"The essence of a sale is the transfer of the property in the thing from seller to buyer. The elements which distinguish a sale from other transfers are:

"(1) That the transfer is of the property; that is, of the
54 general or absolute property, as distinguished from a special property; and

"(2) That it is for a price."

And again, in the same volume, pages 39 and 40:

"If, however, there is a right reserved by the buyer to demand and enforce repayment, the transaction is not a sale, but in the nature of a mortgage."

And the author cites in the note the case of Robinson vs. Farnelly, 16 Ala. 472, as holding: "When the vendee retains the right to demand repayment of the vendor, notwithstanding the purchase, it is conclusive to show that the transaction was intended as a surety and not a sale."

In the light of the authorities cited, the intention of the parties is to govern, and that intention is to be ascertained from the contract and the conduct of the parties in the transactions thereunder.

In the agreed statement of facts, and in the argument of counsel, it was agreed that all of the accounts involved in these transactions between the petitioner and the bankrupt corporations were accounts that were due in 120 days, and that the amounts retained or collected thereon as interest (called in some places service charge) was at least at the rate of twenty-four per cent. per annum. In arriving at the proper construction of the contracts, the accounts will be considered of the 120-day class, as set out in the first paragraph of the contracts, and the discounts or interest charges accordingly. Under the provisions of the contracts, and as the business was conducted by the parties up to February 2, 1912, when bankruptcy proceedings were commenced, the transactions were as follows:

The Chair Company, or the Reed Company, as it happened to be, styled in the contract the first party, being from time to time in need of money, on such occasions made out a list or inventory of accounts owing to it by its customers for goods sold and presented the same to the Home Bond Company, styled in the contract the second party. If the second party found the accounts acceptable to it, it then advanced or paid to the first party seventy-five per cent. of the face

value of the accounts, and the accounts on the books of the latter were stamped as sold to the second party.

The accounts were, under the terms of the contract and in practice by the parties, collected in the name of and by the first party in the regular course of its business, and the proceeds were by the
55 first party turned over to its paid employé, who was mutually acceptable to the parties, and was the attorney in fact for both parties, and who at once transmitted the proceeds of the collection of the account to the second party. If the account was promptly paid in the 120 days, or when due, the second party at once took from the sum so remitted to it the seventy-five per cent. of the face of the account, which had been paid or loaned by it to the second party, and also the five per cent. discount from the face of the account, and the remainder of the proceeds of the collection it at once remitted back to the first party. However, the second party had the right to withhold such "remainder" to make good some other account in default, or where a debtor for an account had become insolvent. But if the account was not promptly paid and accounted for as above stated, when due, then an additional discount, or interest charge on the face value of the account for such overtime, according to the schedule of rates prescribed in the contract, was made by the second party, and also deducted from "the remainder" belonging to the first party. And where the debtor of an account had become insolvent, or in the event of the non-payment of any account at maturity, by the contract, the first party covenanted and obligated itself "to repurchase said account within five days after receipt of written notice thereof."

In all this we find wanting what have been defined to be the essential elements of a sale. (1) There was no transfer of the absolute property in the accounts. The accounts were to be, and were, so far as the transactions were carried out, collected by the first party, the alleged seller, and at its costs and expense. The absolute property in the accounts was not transferred, because the second party only acquired the right to have or take from the proceeds of the account the amount it had advanced thereon and its stipulated usurious interest, and the remainder of the proceeds represented an interest in the account which, by the contract, the first party had at all times retained, and was to go to it or for its benefit. The fact that the entire proceeds of the collection was to be, and was, remitted to the second party, and the "remainder" then remitted back to the first party, can in no sense alter or refute or disguise the fact that the latter at all times had to that extent a property right in the account. (2) No definite price was fixed as the purchase price. And again, there was reserved by the alleged buyer the right to demand and enforce
56 payment, not of the face of the account, but only repayment of the seventy-five per cent. advanced and the stipulated usurious interest, which from the authorities, supra, "is conclusive to show" that the transfer of the accounts was not a sale, but in the nature of a mortgage.

On the other hand we have, as indicative of a loan, a definite amount to be advanced on each account, according to the time at which it became due, with the obligation for the repayment of that

sum with interest at a rate four times the legal rate, and that regardless of whether the account is paid or not.

It is plain to be seen that the only money furnished, or which the second party was in any sense called upon or obligated to furnish, whether called a payment or a loan, on the accounts was the seventy-five per cent., or $75, on the $100.00 of the face of the accounts, and that all the second party was entitled to receive back, whether from the collection of the account, or from its repurchase by the first party, was the $75.00 on the $100.00 of the face of the account, the only amount it had furnished, plus the discount or interest charge, which was at the rate of 20% per annum, or three and one-third times the legal rate on the money so furnished, if the account was paid at maturity, and, according to the statement of agreed facts, amounting in the actual transactions as had to not less than 24% per annum, or four times the legal rate on said amount.

There are very many terms and conditions in the contract to which no reference has been made because their purpose seems only to be to provide guaranty and security to the second party of the performance by the first party of the contract, and serve in some degree only to disguise the real transaction.

In the light of the authorities above quoted, it is the opinion of the Special Master, quite evident from the provisions of the contract and the conduct of the parties thereunder, and it is so by him held, that the contracts were not sales of the accounts involved by the respective bankrupt corporations to the petitioner, but transfers of the accounts as security:

According to the agreed statement of facts, the Indiana statute, like the Kentucky statute fixes 6% per annum as the legal rate of interest; and while the Indiana statute permits interest up to 8% to be contracted for in writing, it provides that if over 8% be contracted for or collected all over 6% is forfeited. And in both States
57 such excess of interest may be relieved against, and if paid recouped. It is immaterial, therefore, whether the contracts in question were made in Indiana or Kentucky.

Therefore, in the settlement of these transactions between the petitioner and the Trustee of the bankrupt estates, the same should be purged of all usury; and the petitioner, the Home Bond Company, be treated in this proceeding as a creditor of the bankrupt corporations with security for its debt.

A claim is asserted by the petitioner for the sum of $140.34, being the aggregate of certain items of court costs, expenses, attorneys' fees, etc., expended by it to enforce the payment of some of the accounts collected by it. That such costs and expenditures were incurred and paid by the petitioner does not seem to be questioned in the response of the Trustee; but for that officer it is simply contended that the costs were incurred and expenditures made by the petitioner after the appointment and qualification of the Custodian on April 9, 1912, and that by reason of the filing of the petitions in bankruptcy and the appointment and qualification of the Custodian of the

bankrupt estates, the right to collect said accounts passed to the Custodian, and that thereafter the right of petitioner to make such expenditures ceased. Although the contract is silent as to when or under what circumstances the petitioner was authorized to incur such costs or liability, or in fact to make collection of any of the accounts; yet under the terms of the 8th clause in the contracts it seems to be conceded that petitioner could "employ counsel or cause legal action to be instituted to enforce the payment of any of said accounts, or any part thereof, either in its own name, or in the name of the first party; and the clause certainly does provide that "in either case" immediate payment shall be made by the first party to the second party of "all court costs, expenses, attorneys' and stenographers' fees" which may be by the latter expended in such proceedings.

It is not averred in the pleadings nor is it made to appear in the agreed statement of facts when petitioner incurred the costs, fees and expenses for which this claim is made; but it seems that these liabilities were incurred by the petitioner in the effort to reduce to money the accounts, which, in the view taken by the Special Master, constituted a security to it for its claim against the bankrupt,
58 and the Special Master is of opinion that under all the circumstances of this case this claim should be allowed to the petitioner.

The petitioner also sets up claim against the Trustee for the sum of $800.00, being $100.00 per month from March 16th to October 12, 1912, inclusive, paid by it to E. Manning, who in the 6th clause of the contract was by the bankrupt appointed attorney-in-fact to receive remittances in payment of the accounts embraced in these transactions and transmit the same to the petitioner. The averment in the petition is that $100.00 per month was a reasonable charge—that under the provisions of said 6th clause of the contract the bankrupt was to pay him, but failing to do so the petitioner was compelled to make such payment.

From the Trustee's response and the agreed statement of facts it appears in substance that during the continuance of the contracts here involved between the petitioner and the New England Chair Company and the American Fibre Reed Company, respectively, said Manning was the Treasurer of the New England Chair Company and its bookkeeper, and Assistant Secretary of the American Fibre Reed Company and its bookkeeper, and was in each of said contracts appointed by the company by whom he was employed the attorney-in-fact as stated: That for all his services while so employed by these companies including such as he rendered as such attorney-in-fact he was to receive a regular salary, and the same was paid to him by the Chair Company until the business was taken over by the Reed Company and then by it up to April 9, 1912, when the Custodian took charge of the bankrupts' estates, with the exception of the two weeks just prior to April 9, 1912, and that two weeks' salary is owing him from the Reed Company. That from April 9, 1912, to September, 1912, said Manning was in the employ of the Custodian as Clerk, and likewise from September —, 1912, until

January —, 1913, he was in the employ of the Trustee as Clerk, and his salary in such employments has been paid him out of the bankrupt estates.

There is no averment in the petitioner's petition of what, if any, services, as such attorney-in-fact, was rendered by said Manning, during the time from March 16, 1912, to November 12, 1912, or any part of it, nor can it be well seen how he could have rendered any service in that capacity inasmuch as the record in this
59 case shows that after his appointment the Custodian and then the Trustee has been receiving all collections of the accounts made, except such as have been collected by the Petitioner, and it was impossible for said Manning to have received any such collections as such attorney-in-fact or made transmittance thereof to petitioner.

In the opinion of the Special Master this claim of the petitioner should be and the same is disallowed; as is also the application of the petitioner for allowance of his attorney's fee in this proceeding.

The United States Supreme Court in the case of Sexton vs. Dryfus, 219 U. S., 343-345, 55 L. Ed., 244, announced the rule that the date of the filing of the petition is the date, in all cases, at which the affairs of the bankrupt are supposed to be wound up, and that the rule applies in the case of secured as well as unsecured creditors.

Sub-section (*h*) of Section 57 of the Bankrupt Act provides: "The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."

The antagonistic attitude of the parties as to their respective rights under the contracts involved has brought the subject into Court, and the effort must be to adjust matters between them as near as may be to these requirements.

Instead of stating the account between the parties as of February 2, 1912, the date of the filing of the petitions in bankruptcy, the parties seem from the agreed statement of facts to have 'contemplated the date of the filing of such agreed statement and to have included interest on some of the items to that time. No injustice can be seen in this provided interest is computed on both sides of the account. Upon that idea the Special Master states this account between the Home Bond Company and the Trustee, based upon the agreed statement of facts as follows:

According to the agreed statement of the facts the total amount of the discount or interest charge retained by the Home Bond
60 Company on accounts of the New England Chair Company collected through the attorney-in-fact, E. Manning, being at the rate of at least 24% per annum upon the 75% of the face of such accounts, advanced or paid on such accounts from the time of such advance or payment to the time of the collection of the account and

remittance to the Home Bond Company, amounts to...		$4,128.96
Only one-fourth thereof would be legal interest		1,032.24
Leaves as due Trustee for usury in sum retained		$3,096.72
Interest at 6% for one year on this sum....		158.80
Agreed amount of the "reserve" from such accounts due the Chair Co. and now in hands of Bond Co.		978.64
Interest at 6% for one year on this sum....		58.71
Total due by Bond Co. on accounts of Chair Co.		$4,292.87
By 75% of $2,845.88 Chair Co. accounts collected by the Trustee	$2,134.41	
By 6% interest thereon for one year	128.06	
By 75% of $2,364.35 Chair Co. accounts uncollected	1,773.26	
By 6% interest thereon for one year	106.39	
		4,142.12
Balance due by Bond Co. to Trustee on Chair Co. acc'ts		$150.75

The amount of the discount or interest charge retained by the Home Bond Co. on accounts of the American Fibre Reed Co., collected through the attorney-in-fact, E. Manning, being at the rate of at least 24% per annum upon the 75% of the face of such accounts advanced or paid on such accounts, from the time of such advance or payment to the time of the collection of the account and its remittance to the Bond Co.—amounts to $679.35

Only one-fourth thereof would be legal interest		169.83
Leaves due Trustee for usury in sum retained		$509.52
61 6% interest on same for seven months.		$17.85
Agreed amount of "reserve" due from accounts of Reed Co. collected by Bond Co. and now in its hands		1,265.38
6% interest on same for seven months		44.31
		$1,837.06
By 75% of $2,409.25 Reed Co. a/cs collected by Trustee	$1,806.93	
By 6% interest on same seven months	38.05	
By 75% of $616.56 Reed Co. a/cs uncollected	462.42	
By 6% interest on same seven months	16.17	
		2,323.57

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Balance due from Trustee to Bond Co. a/c Reed Co. a/cs.....	$486.51
Deduct amount due Trustee from Bond Co. on Chair Co. a/cs.....	150.75
Leaves due Bond Co. from Trustee on both accounts	$335.76
To which add amount allowed Bond Co. for Court costs, attorneys' fees, etc.....	140.34
Makes amount due Bond Co. from Trustee the sum of.....	$576.10

D. W. LINDSEY,
Special Master.

62 *Report of Special Master D. W. Lindsey.*

Filed March 10, 1913.

To the Honorable A. M. J. Cochran, District Judge:

I, D. W. Lindsey, one of the Referees in Bankruptcy of this Court, to whom, as Special Master, was referred the intervening petition of the Home Bond Company of Indianapolis, Indiana, by orders dated November 13, 1912, and December 6, 1912, to hear proof and report to the Court, my findings upon said intervening claimants' petition, do hereby report as follows:

Herewith I return—

(1) The record of the proceedings had before me upon the reference and the orders of reference;

(2) The petition and amended petition of the Home Bond Co. with the exhibits therein referred to;

(3) The responses and amended responses of the Trustee:

(4) The agreed statement of facts, which together with the exhibits with the pleadings constitute all the evidence offered or heard before me; all of which, together with an opinion by the Special Master and this report constitutes the entire record before me; and upon such record I find:

That the intervening petitioner is not entitled to recover, or have allowed it, any part of the claim of $800.00 alleged to have been paid by it to E. Manning for alleged services as the attorney-in-fact named in the contracts exhibited from March 16, 1912, to October 12, 1912.

That the Intervening Petitioner is not the owner of any part of the funds, in the hands of H. V. McChesney, Trustee of the bankrupt estates, sought to be by it recovered.

That the petitioner has a just claim, secured by a lien upon said fund, in the hands of said Trustee, for the sum of $576.10, which includes the $140.34 for Court costs, attorneys' fees and expenses incurred by the petitioner in the collection of some of the accounts

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involved in the transactions between the petitioner and the bankrupt corporations under the contracts set up in and exhibited with the intervening petitions; and in my opinion H. V. McChesney, Trustee, should be ordered and directed to at once pay over to said petitioner, the Home Bond Company, the said sum of $576.10, but only upon condition, and not until the petitioner turns over, or accounts, to said Trustee for the said contracts, to-wit, the contract
63 of March 6, 1911, between petitioner and the New England Chair Company and the contract of November 9, 1911, between petitioner and the American Fibre Reed Company, and any uncollected accounts or papers connected with the uncollected accounts delivered to it under said contracts; and that petitioner be by proper order restrained from itself collecting or in any manner interfering with H. V. McChesney, Trustee, in the collection of any of such uncollected accounts.

I also refer to the opinion transmitted herewith in which is attempted a statement of the accounts between the parties.

Respectfully submitted with request that the Court make such an allowance to the undersigned as Special Master for his services herein as he may deem proper.

D. W. LINDSEY,
Special Master.

Exceptions of Home Bond Company to the Above Report of Special Master, D. W. Lindsey.

Filed March 13, 1913.

To the Honorable A. M. J. Cochran, Judge of the District Court aforesaid:

Comes the Home Bond Company, of Indianapolis, Indiana, and does except to the Report of Special Master D. W. Lindsey, in the matter of the Intervening Petition of said Home Bond Company in the above bankruptcy proceedings—which Report of said Special Master was filed in Court on March 10, 1913, and for exceptions, the said Home Bond Company does urge and present the following (for brevity hereafter, your Petitioner will refer to itself as "Bond Company;" to the Bankrupt, New England Chair Company, as
64 "Chair Company," and to the Bankrupt, American Fibre Reed Company, as "Reed Company"):

First Exception. Said Report is erroneous, and Your Petitioner excepts thereto because it finds that the contract of March 6, 1911, between itself and the said Chair Company, and the contract of November 9, 1911, between itself and the Reed Company, and the transactions thereafter had between Your Petitioner and the said Chair Company and said Reed Company, under the aforesaid written contracts, constituted but a loan of money from Your Petitioner to said Chair Company and Reed Company, with the accounts receivable in question but pledges, or security, for the repayment of said loans;

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Whereas, in fact, the said Master should have found that the aforesaid written contracts and the transactions thereunder and in this Record disclosed, constituted sales of the said accounts receivable from the said Chair Company and the said Reed Company to Your Petitioner.

Second Exception. Your Petitioner excepts to said Report in that said Report finds (page 7 of the typewritten Report):

"In the light of the authorities above quoted, it is the opinion of the Special Master, quite evident from the provisions of the contract and the conduct of the parties thereunder, and it is so by him held, that the contracts were not sales of the accounts involved by the respective bankrupt corporations to the petitioner, but transfers of the accounts as security."

Whereas, said Master should have found—inasmuch as same is a fact—that the transactions in question, with reference to the accounts receivable, were sales of said accounts from the respective Bankrupt corporations, viz: the aforesaid Chair Company and the aforesaid Reed Company, to Your Petitioner.

Third Exception. Your Petitioner excepts to said Report in that the Master finds that the contracts between Your Petitioner and the said Chair Company and Reed Company, and the transactions had thereunder lacked "the essential elements of a sale;" and that

"There was no transfer of the absolute property in the accounts.
The absolute property in the accounts was not transferred
65 because the second party only acquired the right to have, or take from the proceeds of the account the amount it had advanced thereon and its stipulated usurious interest, and the remainder of the proceeds represented an interest in the account which by the contract the first party had at all times retained, and was to go to it or for its benefit. The fact that the entire proceeds of the collection was to be and was remitted to the second party, and the remainder then remitted back to the first party can in no sense alter or refute or disguise the fact that the latter at all times had to that extent a property right in the account." (See page 6 of said typewritten Report.)

Whereas, said Master should have found that the transactions in question did contain "the essential elements of a sale."

Whereas, said Master should have found—inasmuch as same is a fact—that there was a transfer from the Chair Company and Reed Company to Your Petitioner of an absolute property in said accounts; and that Your Petitioner acquired more than merely the right to have or take from the proceeds of the accounts in question the amount it had advanced thereon, and its "stipulated usurious interest."

Whereas, the said Master should have found that there was no "stipulated," or "usurious interest."

Whereas, the Master should have found that Your Petitioner did not merely advance money on said accounts.

Whereas, the Master should have found that neither the Chair Company nor Reed Company had any right as owners of the said accounts to any part of the "remainder of the proceeds," as a result

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of the manner of handling the accounts receivable, or for any other reason.

Whereas, the Master should have found that the arrangement between the Chair Company and Reed Company, as parties of the first part, and Your Petitioner as party of the second part, in the contracts in question, viz: that the entire accounts were remitted directly to Your Petitioner, and it thereafter remitted back to said Chair Company and Reed Company, respectively, certain parts of said accounts receivable, was not a disguise for any alleged loan from Your Petitioner to said Chair Company, or Reed Company, or that said Chair Company or Reed Company "at all times," or at any time,
66 had a property right in said accounts, save and except as same may have arisen under the terms of the contracts in question, which were contracts of sale from said Chair Company and Reed Company of said accounts to Your Petitioner.

Fourth Exception. Your Petitioner further excepts to said Report and charges the same as erroneous in that said Report finds:

"No definite price was fixed as the purchase price. And again there was reserved by the alleged buyer the right to demand and enforce payment not of the face of the account but only repayment of the seventy-five per cent advanced and the stipulated usurious interest, which from the authorities supra 'is conclusive to show' that the transfer of the accounts was not a sale, but in the nature of a mortgage."

Whereas, said Master should have found that a definite price was fixed as a purchase price of the accounts in question, and that there was reserved by Your Petitioner the right to enforce payment of the entire account, and not merely 75% thereof, and alleged usurious interest.

Fifth Exception. Your Petitioner further excepts to said Report in that the Master finds and reports that the transactions between Your Petitioner and the Bankrupt corporations and H. V. McChesney, Trustee thereof, "should be purged of all usury;"

Whereas, said Master should have found and so reported that there was no usury in said transactions.

Sixth Exception. Your Petitioner excepts to said Report in that the Master finds that Your Petitioner

"should be treated in this proceeding as a creditor of the Bankrupt corporations with security for its debt."

Whereas, said Master should have found and so reported that Your Petitioner was not a creditor of the Bankrupt corporations holding security for its debt, but was the absolute owner of and entitled to the accounts receivable in question, and to the funds in the hands of the Trustee represented thereby.

Seventh Exception. Your Petitioner excepts to said Report
67 in that the Master finds that Your Petitioner in the matter of the adjustment of its claim against H. V. McChesney, Trustee of the estates of the Bankrupt corporations, was not entitled to $800.00 expended by it for compensation to E. Manning from March 16th to October 12, 1912, at the rate of $100.00 per month;

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Whereas, said Master should have found that said $800.00 expenditure was proper under the contracts in question, and Your Petitioner was properly entitled to credit therefor.

Eighth Exception. Your Petitioner further excepts to said Report in that the Master finds on page 11 of his typewritten Report that Your Petitioner in casting accounts between itself and the Chair Company would owe the Chair Company $150.75;

Whereas, said Master should have found that Your Petitioner did not owe the Chair Company, or its Trustee, $150.75, or any sum whatsoever.

Ninth Exception. Your Petitioner further excepts to said Report inasmuch as in his tabulation the Master refers to certain moneys retained by and charges of Your Petitioner, as being in excess of legal interest and as being usurious;

Whereas, said Master should have found, because it is a fact, that there was no interest involved in the transactions in question, nor was there any usury in said matters, but that said transactions constituted a sale from the respective Bankrupts to Your Petitioner.

Tenth Exception. Your Petitioner further excepts to said Report in that the Master finds and reports that there is due from the Trustee of the Reed Company and from said Reed Compay to Your Petitioner but the sum of $486.51, and in tabulating the accounts between Your Petitioner and said Reed Company and its Trustee charges Your Petitioner with exaction of illegal interest or usury;

Whereas, said Master should have found that neither the question of interest nor the question of usury entered into the transactions between Your Petitioner and said Reed Company, inasmuch as the accounts receivable in question were sold absolutely by said Reed Company to Your Petitioner.

Eleventh Exception. Your Petitioner further excepts to the finding of the Special Master that there is due to Your Petitioner from the Trustee of the said Chair Company and Reed Company
68 but the sum of $576.10; and that said sum is only due from said Trustee to Your Petitioner upon condition that Your Petitioner

"turns over, or accounts, to said Trustee for the said contracts, to-wit: the contract of March 6, 1911, between the petitioner and the New England Chair Company and the contract of November 9, 1911, between petitioner and the American Fibre Reed Company, and any uncollected accounts or papers connected with the uncollected accounts delivered to it under said contracts; and that petitioner be by proper order restrained from itself collecting or in any manner interfering with H. V. McChesney, Trustee, in the collection of any of such uncollected accounts."

Whereas, said Master should have found that the Trustee of the said Chair Company was and is indebted to Your Petitioner in the sum of $2,845.88, the amount which it is admitted (clause 12 of Agreed Statement of Facts) that he has collected from the accounts receivable in question; and that said H. V. McChesney, as Trustee of the Reed Company, has in his hands the sum of $2,409.25 col-

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lected by said Trustee from the accounts receivable as shown by the aforesaid clause of the Agreed Statement of Facts, and that the said Trustee is withholding the aforesaid two sums of $2,845.88 and $2,409.25 without right from Your Petitioner, and that Your Petitioner is the sole owner of said funds not subject to any condition of any kind. And especially that said Master should have found that Your Petitioner has the sole right to collect the outstanding and uncollected accounts of the Chair Company, embraced in the transactions between Your Petitioner and said Chair Company, which amount upon the faces thereof to $2,364.34; and Your Petitioner is entitled to collect the outstanding, uncollected accounts of the Reed Company, embraced in the transactions in question, the faces of which accounts aggregate $616.56 (see clause 13 of Agreed Statement of Facts). And that said Trustee has no right in any wise to interfere with Your Petitioner's right to collect the aforesaid outstanding accounts of the Chair Company and the Reed Company, and that said Master should have further found and reported that Your Petitioner's right to the aforesaid two funds in the hands of said Trustee, viz: $2,845.88 and $2,409.25, are absolute and
69 aside from its additional right to collect the aforesaid uncollected accounts.

Twelfth Exception. Your Petitioner excepts to so much of said Report as in any wise treats any part of the contracts in question between Your Petitioner and said Chair Company and Reed Company, or any of the transactions thereunder as being tainted with usury, or embracing the matter in any wise of interest upon a loan, or which fails to treat same as absolute sales of the accounts in question from the said Chair Company and Reed Company, respectively, to Your Petitioner;

Whereas, said Master should have found and reported same as absolute sales and should have found and reported accordingly that from a casting of the sales under the contracts in question that there is now in the hands of said H. V. McChesney, as Trustee of the Chair Company, and which belongs to and should be paid over to Your Petitioner the sum of $2,845.88, and in the hands of said McChesney, as Trustee of the Reed Company, and which should be turned over to Your Petitioner, the sum of $2,409.25; and furthermore that Your Petitioner alone should be held to have the right to collect the outstanding and uncollected accounts receivable (referred to in this Record), of the Chair Company, amounting to $2,364.34, and of the Reed Company amounting to $616.56, and that said right should not be interfered with by the said Trustee.

Wherefore, Your Petitioner prays that the aforesaid Exceptions, and each of them, should be sustained by this Honorable Court, and proper Orders and Judgment entered accordingly, and in order that justice may be fully done to Your Petitioner in the premises, and this it will ever pray.

DUFFIN, SAPINSKY & DUFFIN,
Attorneys for Home Bond Company.

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STATE OF KENTUCKY,
County of Jefferson, ss:

S. M. Sapinsky says that he is one of the Attorneys for the Intervening Petitioner, Home Bond Company, and that the aforesaid Exceptions are true in Fact and well founded in Law, and are not in any wise interposed for delay, or for frivolous causes, but only that justice may be done. He says that the Home Bond Company has no officer, or agent, at present in the State of Kentucky.

S. M. SAPINSKY.

70 Subscribed and sworn to before me by S. M. Sapinsky this March 12, 1913. My Commission expires February 24, 1914.

OWEN D. DUFFIN,
Notary Public, Jefferson County, Kentucky.

Opinion of the Court, A. M. J. Cochran, Presiding Judge, in the Matter of the Above Exceptions.

Filed June 19, 1913.

These causes are before me on exceptions filed by the Home Bond Company to the report of Referee Lindsey, as Special Master herein. The matter with which the report has to do is the relation of that Company to certain accounts in favor of the bankrupts, some of which have been collected by the Trustee herein and some by the Company. The latter claims to have been the owner of the accounts when collected under written contracts of purchase. This claim the Trustee contests. Its position is that the Company merely had a lien thereon for certain loans made by it to the bankrupts and legal interest thereon from the dates of the respective loans. The Special Master has upheld this position and stated the accounts between the bankrupts and the Company on this basis. It is of this action that the Company complains by its exceptions.

The contract between the bankrupt, the New England Chair Company, and the Company is in words and figures as follows:

"This agreement made this 6th day of March, 1911, at Indian-
71 apolis, Indiana, by and between New England Chair Company, hereinafter called first party, and the Home Bond Company, hereinafter called second party.

Witnesseth, that, for One Dollar ($1.00) and other good and valuable considerations, each to the other paid, receipt whereof is hereby acknowledged, the parties hereto have agreed and do hereby agree as follows:

First. That said second party shall buy from said first party all acceptable accounts tendered to it by said first party and pay therefor the face value thereof less the following discounts:

One per cent on accounts that are paid within fifteen days.
Two per cent on accounts that are paid within thirty days.
Three per cent on accounts that are paid within sixty days.

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Four per cent on accounts that are paid within ninety days.
Five per cent on accounts that are paid within one hundred and twenty days.
Six per cent on accounts that are paid within one hundred and fifty days.
Seven per cent on accounts that are paid within one hundred and eighty days;

subject, however, to the terms of this and any subsequent written agreement executed by the parties hereto.

Second. That the said party shall pay:
Seventy-eight per cent on thirty day accounts;
Seventy-seven per cent on sixty day accounts;
Seventy-six per cent on ninety day accounts;
Seventy-five per cent on one hundred and twenty day accounts;
Seventy-four per cent on one hundred and fifty day accounts;
Seventy-three per cent on one hundred and eighty day accounts;

upon delivery to and acceptance of such accounts duly assigned to the party of the second part; and collection of the account by the second party; provided, however, no payment of the remainder shall be made while any of said accounts are in default.

72 Third. The first party shall properly assign and deliver to said second party all accounts purchased, including the right of stoppage in transitu, either in the name of the party of the first part or in the name of the party of the second part (provided, however, the party of the second part shall not be charged with negligence in not making stoppage in transitu in any event unless thereunto requested by the party of the first part). If the merchandise named in the accounts should be refused or returned, by the debtor, shall be paid immediately after the *the* remainder, less discount and deductions taken for any cause, the title to such merchandise shall be and remain in said second party until such accounts are paid.

Fourth. Said first party hereby guarantees the payment to the second party or its assigns of all accounts purchased hereunder according to the terms thereof. In the event of non-payment at maturity to said second party, of any accounts as purchased as aforesaid, or should the debtor become insolvent, said first party hereby covenants and agrees to repurchase said accounts within five days after receipt of written notice thereof and to pay therefor the same amount paid to the first party by said second party, plus the discount provided for in the first paragraph of this contract; said second party is hereby given the right without notice to said first party to credit any moneys coming into its possession, belonging to said first party, on its accounts.

Fifth. Immediately after the purchase of every account hereunder, said first party shall make upon its book an entry showing the absolute sale of said accounts to said second party, and said second party is hereby given the right and privilege of auditing the books, accounts and records of said first party, relating to said accounts, at any time that it may see fit to do so.

Sixth. Whereas, it is for the mutual benefit of the parties hereto

that the collection of said accounts shall in the first instance be remitted to the parties of the first part and in its name; the party of the first part shall at all times appoint some person or persons mutually acceptable to both of the parties hereto, their attorney-in-fact to receive all such remittances in whatever form they
73 may be made, and to transfer, assign and transmit all such proceeds to said party of the second part.

And said party of the first part shall immediately upon receipt of such remittances in whatever form the same shall be made, deliver the same to such attorney for transmittal to the party of the second part; and said attorney shall at all times have access to all mail received by said party of the first part and all books and records of the party of the first part, to discover what payments and remittances are made upon such accounts.

And in consideration of the execution of this agreement by the party of the second part, said party of the first part undertakes to guarantee the faithful conduct of said attorney-in-fact in the receipt, assignment and transmittal of all such payments or remittances. And upon the like consideration said party of the first part shall pay unto said attorney-in-fact compensation for all such services so rendered in that behalf; and we will furnish and provide for said attorney-in-fact all necessary clerical or stenographic assistance for making reports and remittances; said attorney-in-fact shall also have the right and power, and it shall be his duty to endorse the name of the party of the first part on any freight or express bill or bill of lading relating to said accounts; and ratifying and confirming all its said attorney may do in the premises. And said attorney-in-fact as to all such matters shall receive such moneys or other remittances solely for the party of the second part and shall at all times be subject to its exclusive orders with relation thereto; and it is now mutually agreed between the parties hereto that E. Manning shall be and continue such attorney-in-fact to perform such duties, until by mutual agreement of the parties hereto, another person shall be appointed in his stead.

Seventh. That said second party in making purchase of accounts hereunder relies upon the guarantees and covenants of said first party herein contained and upon the written representations made to it by said first party as to the financial responsibility of said first party; that said written representation heretofore made and that may hereafter be made are for the purpose of establishing the
74 credit of said first party so that sale of accounts may be made hereunder.

Eighth. That said first party shall execute and deliver to said second party or its assigns, any document necessary or proper to carry into effect this contract, and should second party employ counsel or cause legal action to be instituted to enforce payment of any of said contracts, or any part thereof either in its own name or of the name of the party of the first part, then and in either case said party shall immediately pay to said second party or its assigns, all court costs, expenses, attorneys' and stenographers' fees which may be by it expended in such proceedings.

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In witness whereof, the said first party has hereunto set its hand and seal, and said second party has caused these presents to be executed by its President and Secretary, and its corporate seal to be hereto attached.

THE NEW ENGLAND CHAIR COMPANY, [SEAL.]
By A. D. MARTIN, *President.*

Attest:
CHAS. IRION, *Secretary.*

HOME BOND COMPANY,
By P. J. HAUSS, *Vice-President.*

Attest:
F. H. RUPERT, *Secretary.*

For and in consideration of the execution of the foregoing agreement by the Home Bond Company, the undersigned hereby guarantees to said Home Bond Company the full, prompt and faithful payment and discharge by New England Chair Company, of all and singular the agreements and provisions therein contained to be by said New England Chair Company kept, observed and performed, and hereby waives notice of acceptance of this guarantee by the Home Bond Company.

In witness whereof, we, and each of us, have hereunto set our hands and seals this 6th day of March, 1911.

A. D. MARTIN. [SEAL.]
GRAHAM VREELAND. [SEAL.]
CHAS. IRION. [SEAL.]

Witness:
CHAS. IRION."

The contract between the other bankrupt and the Company is of similar character and dated November 9, 1911. I approve of
75 the conclusion reached by the Special Master and the reasoning on which it is based. The considerations which support this conclusion are that the bankrupts were to and did collect the accounts and bear all expense in connection with their collection; what is claimed to have been the purchase price for the accounts, to-wit: the difference between the fact of the accounts and the discount was not known until payment of the account and receipt thereof by the Company and then depended on the time that had elapsed since the date of the advance of the seventy-five per cent; what is claimed to have been deferred payment of the purchase price was simply a return to the bankrupt of the excess of the collection over and above the advance and discount; and the provision that, in the event of non-payment of any of the accounts at maturity or the debtor becoming insolvent, the bankrupt should repurchase the account and pay therefor the advance made thereupon plus the discount.

The argument on behalf of the Bond Company assumes that the conclusion of the Special Master is based on the consideration that the bankrupt guaranteed the payment of the accounts and is directed

largely to combating the idea that this consideration rendered the transaction a loan and not a purchase. Numerous cases are cited where purchases of notes and accounts accompanied by a guarantee of payment have been held to be purchases and not loans at usurious rates of interest. But I do not understand that the Special Master's conclusion is based on this consideration. Nor is it needed to uphold it. Possibly, however, the fact that the contracts were accompanied by a personal guarantee that the bankrupts would make full, prompt and faithful payment and discharge of all the agreements and provisions therein contained to be kept, observed and performed by it is not without some significance in upholding that conclusion.

The decision of the Circuit Court of Appeals of the Second Circuit in the case of In re Canfield, 193 Fed., 934, and of the Supreme Court of the United States in the same case under the style of Houghton, Receiver, vs. Burden, rendered April 17, 1913, is relied on by the Company as conclusive on the question herein involved. But I fail to see its relevancy to this case. In that case there was no such question in issue as that in issue here. Burden did not claim to have purchased the accounts there involved. He
76 simply claimed a lien thereon to secure a loan and the sole question was whether the contract between him and the bankrupt was usurious and, therefore, under the law of New York, void. The ground upon which it was claimed to be usurious was the provision that, in addition to receiving six per cent on his money, Burden was to receive a certain compensation for certain services to be rendered by him for the bankrupt. The question as to whether this provision rendered the contract usurious hung on whether it was a sham and device to cover usury or really intended to provide compensation for the services called for in the contract.

Here, if the contracts are treated as evidencing loans, there can be question that the discount provided for is usurious. It is for greatly more than the legal rate of interest. The discount provided for is not for services to be rendered by the Company to the bankrupts. It was to render them no services. All that it did or had a right to do was on its own account. Hence the only way of saving the contracts here is to make good the contention that they evidence purchases and not loans. That the Company has failed to do. Rather it has been shown that it is not good.

In so far as the contracts in question here use words fit for a contract of purchase they are mere shams and devices to cover loans of money at usurious rates of interest. That the Company was not adverse to the use of shams is otherwise apparent from the use by it of the word "service," in its dealings with the bankrupts under the contracts, to characterize the discounts. In any view of the contracts those discounts were not charges for services rendered the bankrupts. Loans are never regarded as services.

The report of the Special Master is approved and confirmed.

A. M. J. COCHRAN, *Judge.*

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77 *Order and Decree. Entered July* 10, 1913, *by the Court Through A. M. J. Cochran, Presiding Judge.*

The matter of the claim of the Home Bond Company, Intervenor, coming on to be heard upon the Exceptions of said Home Bond Company to the report of the Honorable D. W. Lindsey, Referee, as Special Master; and the Court having considered the pleadings of the parties, to-wit: the Intervening Petition and Amended Petition of the Claimant, Home Bond Company, together with all of the exhibits filed therewith, the Responses and Amended Responses of H. V. McChesney, Trustee, the written Agreement that the affirmative matter contained in the Trustee's Responses as amended is controverted of record; and the Agreed Statement of Facts, together with the Opinion and Report of the Special Master, and the Claimant's Exceptions thereto, and having heard the argument of counsel for both parties; and the Court, being sufficiently advised, is of the opinion and adjudges:

That said Exceptions of the Claimant, and each and all of them, be, and they are hereby, overruled; and that said Report of the Special Master, together with the statement of accounts between the parties accompanying said report in the opinion of the Special Master, be, and they are hereby, ratified and confirmed.

It is, therefore, ordered and adjudged that the claim of the Home Bond Company for Eight Hundred Dollars paid E. Manning by it, be, and it is hereby, disallowed.

It is also ordered that the said Claimant's claim for Attorneys' fees in this proceeding be, and it is hereby, also disallowed.

It is also ordered and adjudged that the Claimant did not, by virtue of the contracts between it and the respective parties bankrupts and the transactions and conduct of the parties thereto thereunder, become the purchaser or owner of the accounts due the Bankrupts, and referred to in this proceeding, but had only a lien on such accounts to secure the repayment of moneys advanced thereon with interest at the rate of six per cent per annum, and that the Claimant was and is entitled to receive back or recover the moneys so advanced, with such interest. It is, therefore, ordered that the claim of the said Claimant, Home Bond Company, for money collected by H. V. McChesney, as Custodian and Trustee, on accounts due the
78 Bankrupts, be, and it is hereby, disallowed except as to the sum of $335.76, appearing from the Special Master's statement of accounts between the parties to be due Claimant on this behalf from the Trustee.

It is also ordered that the said Claimant's claim for Attorneys' fees, court costs, and other expenses, incurred in the collection of accounts due the Bankrupts, since the filing of the Petitions in bankruptcy, amounting in all to $140.34, be, and it is hereby, allowed.

It is further ordered that to secure the payment of the said two sums above allowed Claimant, to-wit: $335.76, and $140.34, totaling $576.10, Claimant has a lien on the funds realized by the Custodian and Trustee on such accounts due the Bankrupts, and now in the Trustee's hands, and the said Trustee is ordered and directed to

pay to Claimant said sum out of the funds now in his hands as Trustee, such payment to be made, however, only on the condition, and not until, the said Claimant shall turn over, or account to the Trustee for, all accounts due the Bankrupts, or either of them, in Claimant's hands and uncollected at the time of the filing of its Intervening Petition herein.

It is further ordered that the Claimant turn over to and account to the Trustee for, all of the said accounts due said Bankrupts, or either of them, which were in Claimant's hands and uncollected at the time of the filing of its Intervening Petition herein; and that the Claimant be, and it is hereby, restrained and enjoined from itself collecting any of such accounts as may now be uncollected, and from in any way or manner interfering with the Trustee in the collection thereof.

To all of which, except that portion thereof allowing its claim for attorneys' fees, court costs and other expenses, amounting to $140.34, the said Claimant, Home Bond Company, excepts.

The Special Master is allowed $— for his services herein as such, which allowance, together with all the costs of both parties to this proceeding, the Trustee is directed and ordered to pay out of the funds in his hands as such.

79 *Petition for Appeal by Home Bond Company.*
Filed July 23, 1913.

To the Honorable A. M. J. Cochran, Judge of the District Court aforesaid:

The above named Plaintiff, Home Bond Company, Intervenor conceiving itself aggrieved by the decree made and entered on the 10th day of July, 1913, in the above entitled cause, does hereby appeal from said Order and Decree, to the United States Circuit Court of Appeals, for the Sixth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the Record, proceedings and papers, upon which said Order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit.

DUFFIN, SAPINSKY & DUFFIN,
Attorneys for Home Bond Company.

Service of notice of the filing of this Petition for Appeal waived this July 18, 1913.

BODLEY & BASKIN,
BROWN & NUCKOLS,
Attorneys for H. V. McChesney, Trustee.

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Assignment of Errors Filed with said Petition of Appeal.
Filed July 23, 1913.

To the Honorable A. M. J. Cochran, Judge of the District Court aforesaid:

And now on July 23, 1913, comes the said Home Bond Company, Intervening Petitioner and Plaintiff, by its counsel, and says that the decree in said cause rendered herein on July 10, 1913, is
80 erroneous and against the just rights of said Home Bond Company, for the following reasons:

(1) Because the pleadings and proof herein show that the written contracts between the Home Bond Company, on the one hand, and the New England Chair Company and American Fibre Reed Company, on the other, bearing date March 6, 1911, and November 9, 1911, respectively, constituted contracts of purchase by the Home Bond Company from the said Chair Company and Reed Company, respectively, of the accounts receivable in question and the said Home Bond Company, by the various transactions arising under said respective contracts of March 6, 1911, and November 9, 1911, became the owners of said accounts receivable;

(2) Because the pleadings and proof herein, viz: "Agreed Statement of Facts" establish the fact to be that neither the Chair Company, or Reed Company, at the time the Petitions in Bankruptcy were filed against them herein, were the owners, or entitled to the possession, of the accounts receivable in question, and accordingly, their Trustee, H. V. McChesney, obtained no right greater than that of the said two Companies, and was not entitled to collect said accounts receivable, or any of them;

(3) Because the Record herein, viz: pleadings, and exhibits, and Agreed Statement of Facts, disclose- that the said written contracts between the Home Bond Company, on the one hand, and the New England Chair Company, and American Fibre Reed Company, on the other, bearing date March 6, 1911, and November 9, 1911, were not contracts whereby the Home Bond Company was to loan the said Chair Company, and Reed Company, respectively, sums of money at illegal rates of interest, and the Record herein does not make out the transactions between said Bond Company, on the one hand, and the Chair Company, and Reed Company, on the other, to be but loans of money by the Bond Company to said Chair Company, and Reed Company, respectively, at usurious rates of interest.

(4) Because the Record herein discloses that the said Home Bond Company is the owner, and entitled to the immediate possession, of the sum of $2,845.88, now in the hands of said H. V. McChesney, Trustee in Bankruptcy of the New England Chair Company, and which represents the avails of collections of accounts receivable embraced in the transaction between said Chair Company and
81 said Bond Company, and said McChesney, as Trustee, is not entitled to any part of said sum, but same should be immediately turned over to said Home Bond Company, and an order and decree directing him so to do entered;

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(5) Because the Record herein discloses that the said Home Bond Company is the owner, and entitled to the possession, of the sum of $2,409.25, now in the hands of said H. V. McChesney, Trustee in Bankruptcy of the estate of the American Fibre Reed Company, and which represents the avails of collections of accounts receivable embraced in the transactions between said Reed Company and said Bond Company, and said McChesney, as Trustee, is not entitled to any part of said sum, but same should be immediately turned over to said Home Bond Company, and an order and decree directing him so to do, entered;

(6) Because the Record herein discloses that the said Home Bond Company is the owner of, and entitled to control and collect, the remaining outstanding and uncollected accounts of the New England Chair Company embraced in the transactions between said Chair Company and said Bond Company, of the face value of $2,364.34, and said H. V. McChesney, Trustee, has no right, claim, or title, thereto, and a decree should be entered adjudging said Home Bond Company the owner of said accounts;

(7) Because the Record herein discloses that the said Home Bond Company is the owner of, and entitled to control and collect, the remaining outstanding and uncollected accounts of the American Fibre Reed Company, embraced in the transactions between said Reed Company and said Bond Company, of the face value of $616.56, and said H. V. McChesney, Trustee, has no right, claim, or title, thereto, and a decree should be entered adjudging said Home Bond Company the owner of said accounts;

(8) Because the Record herein discloses that said Home Bond Company, in accepting accounts between it and the Bankrupt Companies, is entitled to a credit for $800.00 paid by it to one E. Manning, as shown by the Record herein;

(9) Because the Record herein discloses that the said Home Bond Company, in accepting accounts between it and the Bankrupt
82 Companies, and their Trustee, is entitled to a reasonable Attorney's fee for the services of his Attorneys, rendered herein;

(10) Because the decree herein is in error in holding that said Home Bond Company, by virtue of the contracts between it and the Bankrupts herein, and the transactions and conduct of the said Bond Company and the Bankrupts thereunder, did not become the purchaser, or owner, of the accounts receivable referred to in these proceedings, and said decree was in error and is in error in adjudging to said Bond Company "only a lien on such accounts to secure the repayment of moneys advanced thereon, with interest at the rate of 6% per annum, and that the Claimant was and is entitled to receive back moneys so advanced, with such interest."

(11) Because the decree erred in ordering that the claim of Your Petitioner and Intervenor, the said Home Bond Company, to the aforesaid sums of money, viz: $2,845.88 and $2,490.25, in the hands of said H. V. McChesney, as Trustee of the Chair Company, and Reed Company, respectively, be disallowed, "except as to the sum of $335.76;"

(12) Because the Court was in error and its decree erred in ad-

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judging to Your Petitioner and Intervenor, the said Home Bond Company, only the sum of $335.76, out of the moneys collected by said H. V. McChesney, as Trustee aforesaid;

(13) Because the Court erred and its decree is in error in giving to said Home Bond Company a lien on the funds in the hands of said H. V. McChesney, Trustee, only for the sum of $576.00;

(14) Because the Court erred and its decree is in error in adjudging that before the Trustees should turn over the said $576.10, said Bond Company should turn over to said Trustee "all accounts due the Bankrupts, or either of them, in Claimant's hands and uncollected at the time of the filing of its Intervening Petition herein;"

(15) Because the Court erred and its decree is in error in ordering and directing said Home Bond Company "to turn over to, and account to the Trustee for, all of the said accounts due said Bankrupts, or either of them, which were in Claimant's hands and uncollected at the time of the filing of its Intervening Petition herein;"

(16) Because the Court erred and its decree is in error in restraining and enjoining said Home Bond Company from "itself
83 collecting any of such accounts as may now be uncollected, and from in any way or manner interfering with the Trustee in the collection thereof;"

(17) Because the Court erred and its decree is in error in overruling the Exceptions filed by Your Petitioner and Intervenor, the said Home Bond Company, to Special Master, D. W. Lindsey's Report herein, and in overruling any one of said Exceptions;

(18) Because the Court erred and its decree is in error in upholding and approving and confirming the said Special Master's Report;

(19) Because the Court erred and its decree is in error in holding that the written contracts between the Home Bond Company, and the New England Chair Company, and American Fibre Reed Company, bearing date March 6, 1911, and November 9, 1911, respectively, were but shams, or devices, "to cover loans of money at usurous rates of interest," and were not contracts of purchase of accounts by the said Bond Company from the said Chair Company, and Reed Company, respectively;

(20) Because the Court herein erred in holding that said Home Bond Company was not the owner of the accounts in question, but "merely had a lien thereon for certain loans made by it to the Bankrupts and legal interest thereon from the dates of the respective loans";

(21) Because of the error of the Court in its approval "of the conclusion reached by the Special Master and the reasoning on which it is based;"

(22) Because of the error of the Court in approving all the "considerations" cited by the Special Master in "support" of his conclusion;

(23) Because the Court erred in holding that the "considerations" set forth in its Opinion worked out the contracts in question as contracts of loans of money and not contracts of purchase of accounts;

(24) Because the Court erred in failing and refusing to sustain each and every one of the Exceptions filed by The Home Bond Com-

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pany, on or about March 13, 1913, to the Report of Special Master, D. W. Lindsey, filed herein on March 10, 1913;

(25) Because the Court erred in failing to hold that the Record herein established that the Home Bond Company was entitled to the relief sought herein by it, and especially the relief as outlined by it in its aforesaid Exceptions to the Special Master's Report, and the Court, therefore, erred in failing and refusing to render and
84 enter a decree herein granting the Home Bond Company the aforesaid relief.

Wherefore, Your Petitioner, the aforesaid Intervenor, the Home Bond Company, prays that the aforesaid decree of July 10, 1913, be reversed, and that the Court enter a decree in accordance with the prayer of the said Home Bond Company's Intervening Petition herein as amended, and in accordance with the relief sought by said Home Bond Company as claimed by it in this Record.

DUFFIN, SAPINSKY & DUFFIN,
Attorneys for Intervenor, Home Bond Company.

Notice of the filing of the above "Assignment of Errors" accepted this July 18, 1913.

BODLEY & BASKIN,
BROWN & NUCKOLS,
Attorneys for H. V. McChesney, Trustee Aforesaid.

Order Entered by the Court on July 23, 1913, *A. M. J. Cochran, Presiding Judge.*

This day came Home Bond Company, intervening petitioner and claimant herein, and filed and presented to the court its petition, praying for the allowance of an appeal and assignment of errors intended to be urged by it; and an "Agreed Statement in the matter of Home Bond Company's Appeal;" praying also that a transcript of the record and proceedings and papers upon which judgment was rendered herein (as per the agreed statement), duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

Said Petition, Assignment of Errors and Agreed Statement be and are now filed herein and the Appeal prayed be and is now granted said Home Bond Company.

85 *Appeal and Supersedeas Bond in the Matter of the Home Bond Company's Appeal; Dated August* 7, 1913; *Approved August* 8, 1913.

Know all men by these presents:

That we, Home Bond Company, Principal, and United States Fidelity and Guaranty Company of Baltimore, Surety, are held and firmly bound unto the defendant hereto, H. V. McChesney, the

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Trustee aforesaid in the sum of $250.00, to be paid to the said defendant, his successors and assigns. To which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and each of our successors and assigns, firmly by these presents. Dated this August 7, 1913.

Whereas, the above named Home Bond Company, plaintiff herein, having prosecuted an appeal to the United States Circuit Court of Appeals for the Sixth Circuit to reverse the Decree rendered in the above entitled suit, by the District Court of the United States for the Eastern District of Kentucky on July 10, 1913. Now, therefore, the condition of this obligation is such, that if the above named plaintiff, Home Bond Company, shall prosecute his appeal to effect, and answer all costs, if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

HOME BOND COMPANY,
By S. M. SAPINSKY, *Attorney.*
UNITED STATES FIDELITY & GUARANTY CO.,
By C. W. HAY,
Attorney-in-Fact.
JAMES H. POLSGROVE,
Att'y-in-Fact.

Signed, sealed and delivered in presence of
CHAS. N. WIARD,
Deputy Clerk of the Court Aforesaid.

Approved:
A. M. J. COCHRAN, *Judge.*

August 8, 1913.

86 *Certificate of Clerk.*

THE UNITED STATES OF AMERICA,
Eastern District of Kentucky, sct:

I, J. W. Menzies, Clerk of the United States District Court for the Eastern District of Kentucky, at Covington, do hereby certify that the foregoing 85 pages contain a true, full and complete copy of the following papers and pleadings in the case set out in the caption hereto, as the same appear from the records and files of this office, to-wit:

Citation.

Agreed statement, in the matter of the Home Bond Co.'s appeal.

Intervening claimant's petition of the Home Bond Company of Indianapolis, Indiana, with agreement between the New England Chair Co. and Home Bond Co.

Intervening claimant's petition of the Home Bond Company of Indianapolis, Indiana, with agreement between American Fibre Reed Co. and Home Bond Co.

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Amended claimant's petition of the Home Bond Company, conforming to the order of the Special Master of November 26, 1912.
First sheet of the certificate of indebtedness of the New England Chair Company, and first sheet of report of remittances of the New England Chair Company, and first sheet of certificate of indebtedness of American Fibre Reed Company, and first sheet of report of remittances of American Fibre Reed Company.
Answer of H. V. McChesney, Trustee, respondent, to the intervening petition of the Home Bond Co. in re New England Chair Company, Bankrupt.
Answer of H. V. McChesney, Trustee, respondent, to the intervening petition of the Home Bond Company in re American Reed Company, Bankrupt.
Response of trustee to amended claimant's petition of the Home Bond Co.
Agreed statement of facts filed before the Special Master.
Opinion of D. W. Lindsey, Special Master.
Report of Special Master.
Exceptions of Home Bond Co. to report of Special Master.
Opinion of the Court.
Order and decree of the Court.

87 Petition of Home Bond Co., intervenor, for appeal to the U. S. Circuit Court of Appeals for the Sixth Circuit.
Intervening petitioner's assignment of errors on appeal.
Order filing Petition for Appeal, etc., and allowing Appeal.
Appeal and Supersedeas Bond in the matter of the Home Bond Company's Appeal.
Witness my hand as clerk and the seal of said court, at Covington, Kentucky, this August 28, A. D., 1913, and of our independence the 138th year.

J. W. MENZIES, *Clerk.*

88 And afterwards towit on September 2, 1913, præcipe for appearance of counsel was filed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2529.

HOME BOND COMPANY
v.
H. V. MCCHESNEY et al.

Præcipe.

Clerk of said Court:

Please enter my appearance as counsel for the appellant.

S. M. SAPINSKY,
Appellant's Att'y.

JAS. R. DUFFIN,
OWEN D. DUFFIN,
DUFFIN, SAPINSKY & DUFFIN,
Of Counsel, all Louisville, Ky.

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And afterwards towit on October 16, 1913, a motion to advance cause for hearing, etc. was filed which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2529.

HOME BOND COMPANY
v.
H. V. MCCHESNEY, Trustee, etc.

89 Appeal from the District Court of the United States for the Eastern District of Kentucky.

Motion.

Motions by the Parties hereto to Advance This Case on the Calendar and that the Same be Submitted upon Briefs without Oral Argument.

To the honorable judges of the Circuit Court of Appeals aforesaid:

Comes the Appellant, Home Bond Company, by S. M. Sapinsky, its Attorney, and comes the Appellee H. V. McChesney, Trustee in Bankruptcy of the estates of the American Fibre Reed Company and New England Chair Company, Bankrupts, by Lewis A. Nuckols, his Attorney, and move this Honorable Court as follows:

(1) Pursuant to Section 22 sub. 3 of the Rules of this Court as promulgated on March 15, 1913, this case be advanced on the calendar of this Court for hearing at the earliest convenience of this Court, and in advance of the date on which it would ordinarily be heard;

(2) That the case be submitted and be taken *out* by the Court "upon Briefs, without oral argument", as provided for by Section 23, Sub. 1, of the aforesaid Rules of this Court.

90 In support of these Motions, and as reasons therefor, the aforesaid counsel for Appellant and Appellee respectfully show to this Honorable Court the following:

(*a*) The controversy herein, while not springing directly from bankruptcy administration itself, is the result of bankruptcy proceedings, and is a controversy between the Home Bonding Company, on the one side, and H. V. McChesney, Trustee of the aforesaid two estates in bankruptcy, on the other;

(*b*) The further administration of the two bankrupt estates of the American Fibre Reed Company and the New England Chair Company, awaits the termination of this action, and, in fact, the closing of said estates and the discontinuance of the bankruptcy proceedings involving them, is dependent upon and awaits the outcome of this litigation; and, accordingly, all the parties in interest, viz: the Home Bond Company, as Intervening Claimant, the Appellee, as Trustee, and the creditors of the said Bankrupts, are interested in having an early decision of this appeal;

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(*c*) There is impounded in Court in the neighborhood of
91 $5,300.00 in money which will go according to the decision of this case and the distribution of which awaits same;

(*d*) That there is held up in the hands of the Appellant, Home Bond Company, about $2,300.00 which awaits the outcome of the pending controversy;

(*e*) That there are uncollected accounts receivable amounting to about $3,000.00, face value, which likewise are dependent upon this Court's decision.

Counsel pray the indulgence of this Court in the above request and say that same is made solely for the purpose of bringing about an early decision, which, under the circumstances above considered, is most desirable for all parties in interest, and to reduce to a minimum any further expenses in the aforesaid bankruptcy proceedings.

Respectfully submitted,

HOME BOND COMPANY,
By S. M. SAPINSKY,
Its Attorney.
H. V. McCHESNEY,
Trustee Aforesaid,
By LEWIS A. NUCKOLS,
His Attorney.

92 STATE OF KENTUCKY,
County of Jefferson, ss:

Personally appeared before me a Notary Public with seal in and for the State and County aforesaid, S. M. Sapinsky, who did execute the foregoing paper and acknowledge same to be his act and deed for the purposes above mentioned.

Witness my hand and notarial seal this October 14th 1913. M-commission expires February 24, 1914.

[SEAL.] VIRGIL O. DUFFIN,
Notary Public, Jefferson County, Kentucky.

STATE OF KENTUCKY,
County of Franklin, ss:

Personally appeared before me a Notary Public with seal in and for the State and County aforesaid, Lewis A. Nuckols who did execute the foregoing paper and acknowledge same to be his act and deed for the purposes above mentioned.

Witness my hand and notarial seal this October 14th, 1913. My commission expires at the end of the next session of the General Assembly.

[SEAL.] BERTHA MOORE,
Notary Public, Franklin County, Kentucky.

93 And on the same day towit, October 16, 1913, said motion was submitted to the Court in the words and figures as follows:

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United States Circuit Court of Appeals for the Sixth Circuit.

#2529.

HOME BOND COMPANY
v.
H. V. McCHESNEY, Trustee.

Entry of Submission.

Motion to advance this cause for hearing is submitted.

And afterwards towit on October 17, 1913, an entry was made in said cause in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2529.

HOME BOND COMPANY
v.
H. V. McCHESNEY, Trustee.

Order Advancing Cause.

Upon application of both parties this cause is advanced for hearing and is submitted to the Court upon briefs of counsel without oral argument.

And afterwards towit on January 8, 1914, a decree was entered in said cause in the words and figures as follows:

94 United States Circuit Court of Appeals for the Sixth Circuit.

#2529.

HOME BOND COMPANY
v.
H. V. McCHESNEY, Trustee in Bankruptcy of the Estate of American Fibre Reed Co. et al.

Appeal from the District Court of the United States for the Eastern District of Kentucky.

Before Warrington, Knappen, and Denison, JJ.

Decree.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Kentucky, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause be and the same is hereby affirmed with costs.

And on the same day, towit, January 8, 1914, an opinion was filed in this cause clothed in the words and figures as follows:

Opinion.

95 Filed Jan. 8, 1914. Frank O. Loveland, Clerk.

United States Circuit Court of Appeals, Sixth Circuit.

No. 2529.

HOME BOND COMPANY, Appellant,
v.
H. V. MCCHESNEY, Trustee in Bankruptcy of the Estates of American Fibre Reed Co. and New England Chair Co., Bankrupts, Appellees.

Appeal from the District Court of the United States for the Eastern District of Kentucky.

Submitted October 17, 1913; Decided January 8, 1914.

Before Warrington, Knappen, and Denison, Circuit Judges.

Per CURIAM:

This is an appeal from an order, entered July 10, 1913, overruling exceptions of appellant to the report of a special master, confirming such report, and disallowing certain claims presented by appellant against the estates of the bankrupts. The record is made up under an agreed statement, which was entered into pursuant to Equity Rule 77 of the Supreme Court. A petition in bankruptcy had been filed against each of the two corporations, and after adjudication and the appointment of a trustee, the two cases were consolidated and "directed to proceed as one cause." The report of the special master and the opinion of the court below appear in 206 Fed. 309, 315. One of two similar contracts which are involved, is set out in that opinion; and, since the course of business pursued under these contracts, the nature and extent of the claims so disallowed, the issue and the conclusions reached, as also the terms of the order, are shown in the report of the case, they need be only alluded to here.

96 The special master and the district judge, upon full consideration of the issue and evidence, concurred in the conclusion that the transactions had under the contracts were pledges, not sales, of the accounts receivable. This conclusion is decisive of the issue concerning usury; and its rightfulness is the more apparent because the record discloses to us a mutual intendment that the

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right at least to twenty per cent of the full value of each of the accounts receivable was always to remain in the bankrupts, except only for purposes of security; this right could not be both sold and owned by the bankrupts. Such transactions are unlike those which in form are sales and involve the taking over of promissory notes or the like, including accounts receivable, at a discount, but with the right alike to the entire face value and proceeds. Hence the opinion of Judge Cochran is adopted, and the order accordingly is affirmed with costs.

97 And afterwards towit on February 4, 1914, a petition for appeal was filed in this cause in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2529.

HOME BOND COMPANY, Appellant,

vs.

H. V. MCCHESNEY, Trustee in Bankruptcy of the Estates of American Fibre Reed Company and New England Chair Company, Bankrupts, Appellees.

Petition for Appeal from Above Styled Court to the Supreme Court of the United States.

Comes the Home Bond Company, the Appellant in the above styled cause, and respectfully shows that the above entitled cause is pending in the United States Circuit Court of Appeals for the Sixth Circuit, and that a judgment has therein been rendered on January 8, 1914, affirming the order and decree of the District Court of the United States for the Eastern District of Kentucky made and entered on July 10, 1913; and Appellant shows that the matters in controversy herein exceed $1,000.00 besides interest and costs; that this cause is one wherein it is proper for Appellant to appeal from

98 the aforesaid decree of this Court to the Supreme Court of the United States. Appellant says that it is entitled, as a matter of right, to have the aforesaid decree of this Court of January 8, 1914, reviewed on appeal by the United States Supreme Court (see Section 128 and Section 241 of The New Federal Judicial Code enacted March 3, 1911, and in force and effect January 1, 1912).

Wherefore, the said Appellant prays that an appeal be allowed it in the above entitled cause, directing the Clerk of the United States Court of Appeals for the Sixth Circuit to send the record and proceedings in said cause, with all things concerning same, to the Supreme Court of the United States in order that the errors complained of in the Assignment of Errors herewith filed by said Appellant, may be reviewed, and if errors be found, corrected according to the laws and customs of the United States. Appellant prays that no mandate of this Court do issue herein on its aforesaid decree of

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January 8, 1914, until the above appeal has been heard and determined by the United States Supreme Court.

This January 31, 1914.

DUFFIN, SAPINSKY & DUFFIN,
Attorneys for Appellant, Home Bond Company.

99 Address of Appellant's counsel, Inter-Southern Life Bldg., Louisville, Ky.

Notice of the filing of the above "Petition for Appeal" accepted this February 2nd, 1914.

BROWN & NUCKOLS,
Attorneys vor H. V. McChesney, Trustee Aforesaid.

Address of Appellee's counsel, Frankfort, Ky.

The appeal is allowed as prayed, and bond fixed at five hundred ($500.00) dollars.

J. W. WARRINGTON,
United States Circuit Judge.

Cincinnati, Ohio, February 5, 1914.

And on the same day towit February 4, 1914, an assignment of errors was filed in said cause clothed in the words and figures as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2529.

HOME BOND COMPANY, Appellant,

v.

H. V. MCCHESNEY, Trustee in Bankruptcy of the Estates of American Fibre Reed Company and New England Chair Company, Bankrupts, Appellees.

Assignment of Errors.

100 And now comes the Appellant, Home Bond Company and in connection with its Petition for Appeal in the matter of its appeal to the United States Supreme Court, from the decree of this Court of January 8, 1914, *and* presents and files with said Petition for Appeal the following Assignment of Errors as to which matters and things it says that the decree entered herein on January 8, 1914, is erroneous and it savs that in the record and proceedings herein, and especially in the decree entered herein on said January 8, 1914, there is manifest error, and that the United States Circuit Court of Appeals for the Sixth Circuit erred in this, towit:

First. The said decree was in error in affirming with costs the order and decree of the District Court of the United States for the Eastern District of Kentucky made and entered on July 10, 1913.

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Second. The decree was erroneous in adopting the opinion of the aforesaid District Court (the Hon. A. M. J. Cochran, presiding Judge), which opinion appears reported in 206 Fed. 309-315;

Third. The Court should have refused to adopt the said
101 opinion of Judge Cochran and should have disapproved of same;

Fourth. The court erred in holding that the record disclosed a "mutual intendment that the right at least to 20% of the full value of each of the accounts receivable was always to remain in the bankrupts except only for purposes of security" inasmuch as the Court should have found that there was not a mutual or any intendment that the right at least to 20% of the full value of each of the accounts receivable was always, or ever, to remain, or be in the bankrupts, or either of them, or that the right to said 20% was to be in any one other than in the Appellant, Home Bond Company, and that said right *said to* 20% of the full value of each of the accounts receivable was to be other than the full ownership thereof and title thereto;

Fifth. The Court erred in holding that Appellant held the right to 20% of the full value of each of the accounts receivable "only for purposes of security";

Sixth. The Court erred in holding that the transactions had under the contracts disclosed in the record "were pledges, not sales,
102 of the accounts receivable," and erred in holding that said transactions were pledges of the accounts receivable and not sales thereof;

Seventh. The Court erred in holding that there was usury contained in the transactions had under the contracts in question;

Eighth. Because the Court erred in holding that the conclusion of the Special Master and the District Judge was rightful or in holding that there was "rightfulness" in the decision of either the Special Master or said District Judge;

Ninth. The Court was in error in not reversing the order and decree of the aforesaid District Court entered on July 10, 1913; being the order and decree from which the appeal to this Court was prosecuted;

Tenth. Because the pleadings and proof herein show that the written contracts between the Home Bond Company, on the one hand, and the New England Chair Company and American Fibre Reed Company, on the other, bearing date March 6, 1911, and November 9, 1911, respectively, constituted contracts of purchase by the Home Bond Company from the said Chair Company and
103 Reed Company respectively, of the accounts receivable in question, and the said Home Bond Company, by the various transactions arising under said respective contracts of March 6, 1911, and November 9, 1911, became the owners of said accounts receivable.

Eleventh. Because the pleadings and proofs herein, viz: "Agreed Statement of Facts," establish the fact to be that neither the Chair Company, or Reed Company, at the time the Petitions in Bankruptcy were filed against them herein, were the owners, or entitled to the possession, of the accounts receivable in question, and accordingly, their Trustee H. V. McChesney, obtained no right greater than

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that of the said two Companies, and was not entitled to collect said accounts receivable, or any of them;

Twelfth. Because the record herein, viz: the pleadings and exhibits, and Agreed Statement of Facts, disclose- that the said written contracts between the Home Bond Company, on the one hand, and the New England Chair Company and American Fibre Reed Company, on the other, bearing date March 6, 1911, and November 9, 1911, were not contracts whereby the Home Bond Company
104 was to loan the said Chair Company, and Reed Company, respectively sums of money at illegal rates of interest, and the record herein does not make out the transaction between said Bond Company, on the one hand, and the Chair Company, and Reed Company, on the other, to be but loans of money by the Bond Company to said Chair Company, and Reed Company, respectively, at usurious rates of interest.

Thirteenth. Because the record herein discloses that the said Home Bond Company is the owner and entitled to the immediate possession of the sum of $2,845.88, now in the hands of said H. V. McChesney, Trustee in Bankruptcy of the New England Chair Company, and which represents the avails of collections of accounts receivable embraced in the transaction between said Chair Company and said Bond Company, and said McChesney, as Trustee, is not entitled to any part of said sum, but same should be immediately turned over to said Home Bond Company, and an order and decree directing him so to do entered;

Fourteenth. Because the record herein discloses that the said Home Bond Company is the owner, and entitled to the pos-
105 session, of the sum of $2,409.25, now in the hands of said H. V. McChesney, Trustee in Bankruptcy of the estate of the American Fibre Reed Company, and which represents the avails of collections of accounts receivable embraced in the transactions between said Reed Company and said Bond Company, and said McChesney, as Trustee, is not entitled to any part of said sum, but same should be immediately turned over to said Home Bond Company, and an order and decree directing him so to do, entered;

Fifteenth. Because the record herein discloses that the said Home Bond Company, is the owner of, and entitled to control and collect, the remaining outstanding and uncollected accounts of the New England Chair Company embraced in the transactions between said Chair Company and said Bond Company, of the face value of $2,364.34, and said H. V. McChesney, Trustee, has no right, claim, or title thereto, and a decree should be entered adjudging said Home Bond Company the owner of said accounts;

Sixteenth. Because the record herein discloses that the said Home Bond Company is the owner of, and entitled to control and
106 collect, the remaining outstanding and uncollected accounts of the American Fibre Reed Company, embraced in the transactions between said Reed Company and said Bond Company, of the face value of $616.56, and said H. V. McChesney, Trustee, has no right, claim, or title thereto, and a decree should be entered adjudging said Home Bond Company, the owner of said accounts:

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Seventeenth. Because the record herein discloses that said Home Bond Company, in accepting accounts between it and the Bankrupt Companies, is entitled to a credit for $800.00 paid by it to E. Manning, as shown by the record herein;

Eighteenth. Because the record herein discloses that the said Home Bond Company, in accepting accounts between it and the Bankrupt Companies and their Trustee, is entitled to a reasonable attorneys' fee for the services of his attorneys, rendered herein;

Nineteenth. Because the decree herein is in error in holding that said Home Bond Company, by virtue of the contracts between it and the Bankrupts herein, and the transactions and conduct of
107 the said Bond Company and the Bankrupts thereunder did not become the purchaser, or owner, of the accounts receivable referred to in these proceedings, and said decree was in error and is in error in adjudging to said Bond Company "only a lien on such accounts to secure the repayment of moneys advanced thereon, with interest at the rate of 6% per annum, and that the claimant was and is entitled to receive back moneys so advanced, with such interest";

Twentieth. Because the decree erred in ordering that the claim of your Petitioner and Intervenor, the said Home Bond Company, to the aforesaid sums of money, viz: $2,845.88 and $2,490.25, in the hands of said H. V. McChesney, as Trustee, of the Chair Company and Reed Company, respectively, be disallowed "except as to the sum of $335.76;

Twenty-first. Because the Court was in error and its decree erred in adjudging to your Petitioner and Intervenor, the said Home Bond Company, only the sum of $335.76, out of the moneys collected by said H. V. McChesney, as Trustee aforesaid;

Twenty-second. Because the Court erred and its decree is
108 in error in giving to said Home Bond Company a lien on the funds in the hands of said H. V. McChesney, Trustee, only for the sum of $576.00;

Twenty-third. Because the Court erred and its decree is in error in adjudging that before the Trustee should turn over the said $576.10, said Bond Company should turn over to said Trustee "all accounts due the Bankrupts, or either of them, in claimant's hands and uncollected at the time of the filing of its Intervening Petition herein;

Twenty-fourth. Because the Court erred and its decree is in error in ordering and directing said Home Bond Company "to turn over to, and account to the Trustee for, all of the said accounts due said Bankrupts, or either of them, which were in Claimant's hands and uncollected at the time of the filing of its Intervening Petition herein";

Twenty-fifth. Because the Court erred and its decree is in error in restraining and enjoining said Home Bond Company from "itself collecting any of such accounts as may now be uncollected, and from in any way or manner interfering with the Trustee in the collection thereof";

Twenty-sixth. Because the Court erred and its decree is in
109 error in overruling the exceptions filed by your Petitioner and Intervenor, the said Home Bond Company, to Special Master

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D. W. Lindsey's report herein, and in overruling any one of said exceptions;

Twenty-seventh. Because the Court erred and its decree is in error in upholding and approving and confirming the said Special Master's report;

Twenty-eighth. Because the Court erred and its decree is in error in holding that the written contracts between the Home Bond Company, and the New England Chair Company, and American Fibre Reed Company, bearing date March 6, 1911, and November 9, 1911, respectively, were but shams, or devices, to cover loans of money at usurious rates of interest and were not contracts of purchase of accounts by the said Bond Company from the said Chair Company and Reed Company, respectively;

Twenty-ninth. Because the Court erred in holding that said Home Bond Company was not the owner of the accounts in question, but "merely had a lien thereon for certain loans made by it to the Bankrupts and legal interest thereon from the dates of the re-
110 spective loans;

Thirtieth. Because of the error of the Court in its approval "of the conclusion reached by the Special Master and the reasoning on which it is based";

Thirty-first. Because of the error of the Court in approving all the "considerations" cited by the Special Master in "support" of his conclusion;

Thirty-second. Because the Court erred in holding that the "considerations" set forth in its opinion worked out the contracts in question as contracts of loans of money and not contracts of purchase of accounts;

Thirty-third. Because the Court erred in failing and refusing to sustain each and every one of the exceptions filed by the Home Bond Company, on or about March 13, 1913, to the Report of Special Master D. W. Lindsey, filed herein on March 10, 1913;

Thirty-fourth. Because the Court erred in failing to hold that the record herein established that the Home Bond Company was entitled to the relief sought herein by it, and especially the relief as outlined by it in its aforesaid exceptions to the Special Master's Report,
111 and the Court, therefore erred in failing and refusing to render and enter a decree herein granting the Home Bond Company the aforesaid relief.

Wherefore, the Home Bond Company, Appellant, prays that the aforesaid decree of the United States Circuit Court of Appeals for the Sixth Circuit may be reversed and this Appellant may have an adjudication and decree in its favor as hereinabove specified, and be granted the relief as hereinabove indicated.

DUFFIN, SAPINSKY & DUFFIN,
Attorneys for Appellant, Home Bond Company.

Notice of the filing of the above "Assignment of Errors" accepted this February 2nd, 1914.

BROWN & NUCKOLS,
Attorneys for H. V. McChesney, Trustee Aforesaid.

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112 And afterwards towit on February 26, 1914, a bond was filed in said cause which reads and is as follows:

United States Circuit Court of Appeals for the Sixth Circuit.

#2529.

HOME BOND COMPANY, Appellant,
v.
H. V. MCCHESNEY, Trustee in Bankruptcy of the Estates of American Fibre Reed Company and New England Chair Company, Bankrupts, Appellees.

Bond.

Know all men by these presents:

That we, Home Bond Company, of the City of Indianapolis, Marion County, State of Indiana, as principal, and The National Surety Company, of the City of New York, New York, as surety, are held and firmly bound unto the Appellee herein, H. V. McChesney, Trustee in Bankruptcy of the Estates of American Fibre Reed Company and New England Chair Company, Bankrupts, in the sum of $500.00 to be paid to the said Appellee; we bind ourselves and each of our representatives, successors and assigns, jointly and severally, firmly by these presents.

113 Sealed with our hands and seals this February 9, 1914.

Whereas the Appellant in the above entitled cause, Home Bond Company, has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered and entered in the above entitled cause in the United States *Supreme* Court of Appeals for the Sixth Circuit on January 8, 1914.

Now, therefore, the condition of this obligation is such that if the said Home Bond Company, Appellant, shall prosecute said appeal to effect and answer all damages and costs if they fail to make said appeal good, then this obligation shall be void, otherwise to remain in full force and virtue.

Executed at Louisville, Kentucky, February 24, 1914.

[SEAL.] HOME BOND COMPANY,
By DUFFIN, SAPINSKY & DUFFIN,
Its Attorneys.
NATIONAL SURETY COMPANY,
By S. M. FERRIS, *Attorney-in-Fact.*

The foregoing bond is approved this February 22, 1914.

J. W. WARRINGTON,
United States Circuit Judge, Sixth Circuit.

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114 UNITED STATES OF AMERICA,
Sixth Judicial Circuit, ss:

To H. V. McChesney, Trustee in Bankruptcy of the Estates of The American Fibre Reed Company and The New England Chair Company, Bankrupts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof pursuant to an appeal filed in the clerk's office of the United States Circuit Court of Appeals for the Sixth Circuit, wherein The Home Bond Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant as in said petition for appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John W. Warrington, United States Circuit Judge for the Sixth -cuit this 26th day of February in the year of our Lord one thousand nine hundred and fourteen.

J. W. WARRINGTON,
United States Circuit Judge, Sixth Circuit.

Service of the foregoing Citation accepted and acknowledged this March 2nd, 1914.

H. V. McCHESNEY,
Trustee Aforesaid,
By BROWN & NUCKOLS,
His Attorneys.

115 United States Circuit Court of Appeals for the Sixth Circuit.

I, Frank O. Loveland, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of the record and proceedings and the original citation in the case of Home Bond Company vs. H. V. McChesney, Trustee, etc. No. 2529, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In testimony whereof, I have hereunto subscribed my name, and affixed the seal of said Court, at the City of Cincinnati, Ohio, this 4th day of March, A. D. 1914.

[Seal United States Circuit Court of Appeals, Sixth Circuit.]

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

Endorsed on cover: File No. 24,097. U. S. Circuit Court Appeals, 6th Circuit. Term No. 946. The Home Bond Company, appellant, vs. H. V. McChesney, trustee in bankruptcy of the estates of the American Fibre Reed Company and the New England Chair Company, bankrupts. Filed March 13th, 1914. File No. 24,097.

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Office Supreme Court, U. S.
FILED
MAR 18 1915
JAMES D. MAHER
CLERK

No. 390

Supreme Court of the United States

No. 946
(OCTOBER TERM, 1913)

HOME BOND COMPANY, (Intervenor below) - Appellant,

vs.

H. V. McCHESNEY, Trustee, etc.,
(Defendant below) - - - Appellee.

BRIEF FOR APPELLANT

S. M. SAPINSKY,
Attorney for Appellant,
Louisville, Ky.

Of Counsel
JAMES R. DUFFIN,
OWEN D. DUFFIN,
S. M. STOCKSLAGER.

THE STANDARD PRINTING CO., INCORPORATED, LOUISVILLE.

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Supreme Court of the United States

October Term, 1913.

No. 946.

HOME BOND COMPANY (Intervenor below), - *Appellant,*

vs.

H. V. MCCHESNEY, Trustee, etc., (Defendant below) - *Appellee.*

BRIEF FOR APPELLANT.

STATEMENT OF CASE.

MAY IT PLEASE THE COURT:

The Home Bond Company, of Indianapolis, is an Indiana corporation, and, as stated in its original Intervening Petitions, is endowed "with power to sue and be sued, contract and be contracted with, and to carry on business generally as a natural person, *and especially to carry on the business of buying from others, accounts and bills receivable due them.*" (5 and 10 Rec.)

The New England Chair Company and its successor, American Fibre Reed Company, are Kentucky corporations, which were engaged in business at Frankfort, Kentucky.

On March 6, 1911, the said New England Chair Company, as "first party," and our client, Home Bond Company, as "second party," entered into a written contract, a copy of which is attached to the Intervening Petition (7-9 Rec.), and which is likewise set out in full in Judge Cochran's Opinion (59-62 Rec.)

The New England Chair Company, about November 1, 1911, was taken over by the American Fibre Reed Company, owned and officered by practically the same people, and the

said latter Company, viz.: American Fibre Reed Company, absorbed all of the assets and assumed all of the liabilities of the Chair Company. Accordingly, on November 9, 1911, a written contract was entered into between said Reed Company, as "first party," and our client, Home Bond Company, as "second party," *similar in all respects* to the Chair Company contract, differing only as to some of the names of the individuals signing on behalf of the Companies. In our reference to said contracts, we will treat of same in the singular number, because of the exact similarity of the two contracts.

On behalf of the Home Bond Company we assert that by the contracts in question—and the transactions pursuant thereto—*a sale* was had by the aforesaid Companies to our client of certain choses in action, viz: accounts receivable—in other words, we bought from said two Companies, certain accounts due them. On the other hand, it is the claim by the Trustee (Appellee here), that the said contracts and the transactions thereunder, constituted but a *loan* of money by the Home Bond Company to the New England Chair Company and the American Fibre Reed Company, respectively, with the aforesaid accounts receivable occupying but the attitude of collateral security.

In other words, we contend that the Home Bond Company, because of said contracts and the transactions under them, became the *owners* of the accounts receivable, while the Trustee denies this contention and says that our client had but a lien on said accounts receivable to secure it in the repayment to it of sums of money (with legal interest thereon), *loaned* to said two companies.

On February 1, 1912, involuntary petitions in bankruptcy were filed against both the New England Chair Company, and the American Fibre Reed Company, by certain of their creditors, which, on August 26, 1912, resulted in their respective adjudications as Bankrupts. H. V. McChesney (under appointment by Referee W. D. Lindsey, of Frankfort, Kentucky),

had been acting as Custodian, or Receiver, for said two Companies, and after their aforesaid adjudications, was duly elected Trustee. The two cases were consolidated and "directed to proceed as one cause," and have been administered as *one estate.* (2-3 Rec.)

On behalf of said Home Bond Company, on November 13, 1912, we filed Intervening Petitions (5-15 Rec.), in which we asserted claim to certain funds in the hands of said McChesney, Trustee, which he had obtained from the collection of accounts receivable, which, we maintained, belonged to our client under the aforesaid contracts of March 6th and November 9th, 1911, and the transactions thereunder, and for such other relief as appears in our pleadings.

Our Intervening Petitions were referred by His Honor, Judge A. M. J. Cochran (presiding over said United States District Court for the Eastern District of Kentucky), to the Hon. D. W. Lindsey, as Special Master; and thereafter we filed a voluminous amendment, the chief volume consisting of 98 "Certificate of Indebtedness" sheets, and 213 "Report of Remittances" sheets, covering the transactions between the New England Chair Company, and our client, and 35 "Certificate of Indebtedness" sheets, and 78 "Report of Remittances" sheets, evidencing the transactions between the Home Bond Company and the American Fibre Reed Company. To avoid needlessly encumbering the record, we have brought up but one each of said sheets, and same are found on pages 23-28 Record (see Clause 4 of Agreement on page 3, Rec.).

The Trustee contested our said claim (see his Answer 29-40 Rec.), and contended (as heretofore stated), that our transactions with the two bankrupt corporations were not those of a *buyer* of the accounts receivable in question, but merely constituted loans of money (with the said accounts receivable as collateral security only), from us to said Companies, at an exaction of illegal interest; and that when the alleged usury has been expunged from the transactions, the Trustee would owe us but a *small* balance.

Our claimant's Petition likewise sought the right on our part to continue the collection of certain accounts receivable still in our hands unpaid. This right was denied by the Trustee on the same grounds as just above indicated.

The Trustee's Responses to our Claimant's Petitions were controverted of record, and when the matter came on for trial before the Special Master on February 4, 1913, an "Agreed Statement of Facts," was filed with him to be taken in lieu of proof upon the issues. (Rec. 40-44.)

On March 10, 1913, the Special Master filed an Opinion and Report (45-54 Rec.), *upholding* the Trustee's contention, and *overruling* our claim, and finding that the aforesaid contracts and the transactions thereunder did not constitute a "buy and sell" arrangement concerning the Accounts Receivable, but that when said contracts and transactions were properly construed and analyzed, they were but a "shift" or "device," to enable our client to make loans of money to the Bankrupt corporations at illegal rates of interest; and that accordingly, said Accounts Receivable were held by our client only as collateral security for said "loans." Thereupon, instead of adjudging that McChesney, as Trustee of the Chair Company, should pay over to us the sum of $2,845.88, and as Trustee of the Reed Company, should pay over to us $2,409.25 (Clause 12 of "Agreed Statement of Facts" Page 43 Rec.), and should permit us unhampered to collect the remaining accounts, subject only to such control as would be proper and equitable under the circumstances—the Special Master found that we were entitled to *but* the sum of $576.10 to be paid by said Trustee only upon condition that we surrender and cancel our aforesaid two contracts of March 6th and November 9th, 1911, and turn over to the Trustee all "uncollected accounts or papers connected with the uncollected accounts," which might be in our hands. (52-54 Rec.)

Our Exceptions to the said Report (54-58 Rec.) were *overruled* by the Trial Court (the Honorable A. M. J. Cochran, Judge), (Opinion, 59-63 Rec., and Decree, 64-65 Rec.).

We assigned errors (66-69 Rec.), and on appeal to the United States Circuit Court of Appeals for the Sixth Circuit, the District Court's ruling was affirmed (75-76 Rec.) (Home Bond Co. v. McChesney, 210 Fed. 893). *Hence this appeal.*

CONTRACT UNDER CONSIDERATION.

The contract here under consideration contains eight clauses (7-9 Rec.), and succinctly stated, said clauses are as follows:

FIRST: The said Second Party (Home Bond Company) "shall buy from said First Party" the Chair Company or Reed Company, as the case might be) "all acceptable accounts tendered to it by said First Party and pay therefor the face value thereof," less discounts of 1% on 15 day accounts; 2% on 30 day accounts; 3% on 60 day accounts; and 1 additional per cent on each additional 30 days beyond 60 day accounts—the last per cent being 7% on 180 day accounts.

SECOND: This clause provides that "upon delivery to and acceptance by Second Party of such accounts, duly assigned to the Party of the Second Part," it (said Home Bond Company) shall pay to the Chair Company, or Reed Company, as the case might be, "78% on 30 day accounts; 77% on 60 day accounts; 76% on 90 day accounts; 75% on 120 day accounts; 74% on 150 day accounts; 73% on 180 day accounts; * * * and the remainder, less discount and deductions taken by the debtor, shall be paid immediately after the collection of the account by the Second Party." It will be observed that this clause, in effect, leaves unpaid—say on 120 day accounts—20% thereof. In other words, the Bond Company, on a 120 day account, would pay to the Reed Company 75% thereof, and when the account was collected, would then settle for the remainder of the purchase price, viz: 20%, and retain its 5% profit.

THIRD: This clause provides that the Chair Company, or Reed Company, "shall properly assign and deliver to said Second Party all accounts purchased, including the right of stoppage in transitu * * *. If the merchandise named in the accounts should be refused and returned for any cause, the title to said merchandise shall be and remain in said Second Party until such accounts are paid."

FOURTH: This clause is a "guaranty" by the Chair Company, or Reed Company, to the Home Bond Company "of all accounts purchased thereunder according

to the terms thereof." This is nothing more nor less than a *guaranty of quality.* Said fourth clause permits the Home Bond Company to require the Chair Company, or Reed Company, "to re-purchase said accounts within five days after receipt of written notice thereof." It further permits said Bond Company to retain "any moneys coming into its possession belonging to said First Party" to make good said guaranty.

FIFTH: This clause provides that "immediately after the purchase of every account thereunder, said First Party shall make upon its book an entry showing the absolute sale of said accounts to said Second Party." It further gives to said Second Party "the right and privilege of auditing the books, accounts and records of said First Party, relating to said accounts, at any time that it may see fit so to do."

SIXTH: This clause provides that the Chair Company, or Reed Company, "shall in the first instance" collect the accounts through the agency of some person appointed by said First Party but who shall be "mutually acceptable to both of the parties hereto;" said clause further providing: "said attorney-in-fact to receive all such remittances in whatever form they may be made, and to transfer, assign and transmit all such proceeds to said Party of the Second Part." Said clause further gives to said attorney-in-fact access at all times "to all mail received by said Party of the First Part and all books and records of the Party of the First Part, to discover what payments and remittances are made upon such accounts." Said clause contains other provisions with reference to the said "attorney-in-fact."

SEVENTH: This clause sets forth that the Home Bond Company, in purchasing the accounts, relies upon the "guaranties and covenants of the said First Party herein contained, and upon the written representations made to it by said First Party as to the financial responsibility of said First Party." There are further provisions in this clause not necessary to here refer to.

EIGHTH: This clause provides that the Chair Company, or Reed Company, "shall execute and deliver to said Second Party, or its assigns, any document necessary or proper to carry into effect this contract." It further provides that should the Bond Company "employ counsel, or cause legal action to be instituted to enforce the payment of any of said accounts, or any part thereof,

either in its own name, or in the name of the Party of the First Part, then and in either case said First Party shall immediately pay to said Second Party, or its assigns, all court costs, expenses, attorney's and stenographer's fees, which may be by it expended in such proceedings."

A clear insight into the transactions between our client and the bankrupt companies will be obtained by Your Honors by analyzing one "Certificate of Indebtedness" sheet and one "Report of Remittances" sheet. Thus: "Certificate of Indebtedness" sheet No. 1, emanating from our Company to the Reed Company (26-27 Rec.), discloses that on November 20, 1911, the Home Bond Company paid to the American Fibre Reed Company the sum of $470.18, which equals 75 per cent. of the 23 accounts set forth on said sheet aggregating $626.90; that there remained *unpaid* from the Home Bond Company to the Reed Company on said purchase price $125.38, viz: 20 per cent. of said $626.90; that our client's profit, as outlined in the Contract of Sale, was 5 per cent. on $626.90, viz: $31.34. Said sheet sets forth, under appropriate headings, the names of the debtors, their addresses, the dates of the invoices, the amounts thereof, and then shows the following:

Service 5 per cent	$ 31.34
Reserve 20 per cent	125.38
Check	470.18
Total	$626.90

which, when read in the light of the contract between the parties, means that the Home Bond Company bought of the American Fibre Reed Company the 23 Accounts Receivable mentioned on said sheet aggregating $626.90, at a discount of 5 per cent. thereof, viz: $31.34. That said Bond Company paid to said Reed Company on said purchase price the sum of $470.18, and still owed said Reed Company on said purchase price the sum of $125.38.

Now, just as soon as this transaction was carried out, the accounts appearing on said lists "were stamped upon the books"

of the American Fibre Reed Company "to the effect that the accounts so stamped had been sold to the Home Bond Company, and itemized statements of such accounts were delivered to the Home Bond Company." (See Clause 2 of "Agreed Statement of Facts" on page 41 Rec.) One cannot conceive of a more *complete delivery* of a chose in action than the procedure just above outlined.

Now then turn to the "Report of Remittances" sheet No. E-1 (28 Rec.). Same shows that on December 15, 1911, the Home Bond Company collected the sum of $255.60 from the Dow Wire & Iron Co., and 10 others, in the matter of the accounts due from them to the American Fibre Reed Company; that the invoices of the Reed Company against said debtors aggregated $263.60, but the said debtors claimed discounts and allowances of $7.93. Said Report of Remittances sheet further shows the serial numbers of the various accounts receivable, as same are contained on the Home Bond Company's books, and likewise shows the respective dates of the purchases of said accounts, and thus may be easily traced the "Certificate of Indebtedness" sheet where each account appears at the time of its purchase.

Said sheet has a heading styled "Rebate." In explanation of this we beg to say that (as shown in the Amended Claimant's Petition—17 Rec.), as a matter of convenience the parties treated all of the accounts as "120 day" accounts, which would make the Bond Company's profits 5 per cent. of the face of each account. Whenever it happened that an account was paid within less than "120 days," then the selling company was entitled to a "rebate," or in other words, the selling company was entitled to receive from us a larger price than if the account had been of longer duration. And so likewise, if the account ran over the "120 day" period, the seller was charged with the additional agreed charge of 1-30 of 1 per cent. "for each day after the said 120 days." (Amended Claimant's Petition—18 Rec.)

Now then the aforesaid "Report of Remittances" sheet discloses that on December 15, 1911, the Home Bond Company sent with said sheet its check in favor of the Reed Company for the sum of $53.65, which represented the Reed Company's "reserve," or unpaid purchase price of $52.72 (20 per cent. of $263.60, the amount of the invoices), plus $8.86, the amount of "rebate" (owing to certain accounts having been paid within the "120 day" period), less, however, the sum of $7.93, which the Reed Company's debtors, or customers, had claimed because of "discounts and allowances." The closing line on said "Report of Remittances" sheet uses this language: "Enclosed please find check for $53.65 in full of above settlement."

The dealings between the Chair Company and the Bond Company necessitated 98 "Certificates of Indebtedness" sheets, and 213 "Report of Remittances" sheets; while the transactions between the Reed Company and our client called for 35 of the first named sheets, and 78 of the second named. As heretofore shown, but one of each of said sheets with each Company has been copied into the Record.

STATUTES INVOLVED.

The Statutes presented by this Record for Your Honors' consideration are the following:

Section 2218, Chapter 72, Kentucky Statutes:

> "Legal interest shall be at the rate of six dollars upon one hundred dollars for one year, and at the same rate for a greater or less sum, and for a longer or shorter time."

Section 2219, Chapter 72, Kentucky Statutes:

> "All contracts and assurances made, directly or indirectly, for the loans or forbearance of money, or other thing of value, at a greater rate than legal interest, shall be void for the excess over the legal interest. The amount loaned, with legal interest, may be recovered on any such contract or assurance; but if the lender refuse, before suit brought, a tender of the principal, with legal interest, he shall pay the costs of any suit brought on such contract or assurance.
>
> 1. A court of equity may grant relief for any such excess of interest, and to that end compel the necessary discovery from the lender or forbearer.

2. Such excess of interest may be recovered from the lender or forbearer, although the payment thereof was made to the assignee.

3. Partial payment on a debt bearing interest shall be first applied to the extinguishment of the interest then due."

Section 7043, Chapter 80, Burns' Annotated Indiana Statutes (Revision of 1901):

"The interest on loans or forbearance of money, goods, or things, in action, when the parties do not agree on the rate, shall be six dollars a year on one hundred dollars, and at that rate for a greater or less sum, or for a shorter or longer time; but it may be taken yearly, or for a shorter period, in advance. No agreement to pay a higher rate shall be valid, unless the same be in writing, signed by the party to be charged thereby; and, in such case, it shall not be lawful to contract for more than eight per centum per annum."

Section 7046, Chapter 80, Burns' Annotated Indiana Statutes (Revision of 1901):

"When a greater rate of interest than is hereby allowed shall be contracted for, the contract shall be void as to the usurious interest contracted for; and in an action on such contract, if it appear that interest at a higher rate than eight per cent. has been directly or indirectly contracted for, the excess of interest over six per cent. shall be deemed usurious and illegal, and in an action on a contract affected by such usury, the excess over the legal interest may be recouped by the debtor, whenever it has been reserved or paid before the bringing of the suit."

Your Honors will find the aforesaid Indiana Statutes set forth in Clause 15 of the "Agreed Statement of Facts" (43-44 Rec.). Said sections are there referred to by former numbers, viz: 7950 and 7953, respectively.

SPECIFICATIONS OF ERROR.

The Assignments of Error appear on pages 77-81 of Record. The chief error which we particularly press to the attention of Your Honors is: (a) The finding by the said Circuit Court of Appeals that our contracts, supra, and the transactions thereunder, evidenced not sales of the accounts receivable in question, from the bankrupt companies to our client, but simply were makeshifts for loans from our client, Home Bond Company, to the respective bankrupt companies.

The construction of said contracts and the transactions thereunder is the controlling matter in this case. All other questions and matters are but subordinate and incidental to said main question.

The above specification of error—which error was committed by the Special Master, the District Court, and the Circuit Court of Appeals—is shown in our Sixth, Seventh, Tenth, Eleventh, Nineteenth, Twenty-eighth, Twenty-ninth and Thirty-second "Assignments of Error" (78-81 Rec.).

We will not encumber this brief by repeating here in full the above assignments of error, but the Nineteenth assignment so fully embodies said specification, supra, that we will take the liberty of setting same out here verbatim:

> "Nineteenth: Because the decree herein is in error in holding that said Home Bond Company, by virtue of the contracts between it and the Bankrupts herein, and the transactions and conduct of the said Bond Company, and the Bankrupts thereunder, did not become the purchaser, or owner, of the accounts receivable referred to in these proceedings, and said decree was in error and is in error in adjudging to said Bond Company 'only a lien on such accounts to secure the repayment of moneys advanced thereon, with interest at the rate of 6% per annum, and that the claimant was and is entitled to receive back moneys so advanced, with such interest.'"

As incidental to the above main question, we urge that: (b) Special Master Lindsey's "casting of accounts" (52-53 Rec.) is clearly erroneous, and that we were entitled to recover from H. V. McChesney, Trustee of the two bankrupt companies, the sums of $2,845.88 and $2,409.25, respectively; and that an Order should have been entered in the bankruptcy cases, directing said McChesney, Trustee, to turn over *instanter* to our client, the aforesaid two sums (Clause 12 "Agreed Statement of Facts," 43 Rec.). The Court's failure to enter such an Order is earnestly urged by us as error. (Twentieth Assignment of Error—80 Rec.)

We further urge as error: (c) The failure of the Court to hold that we are entitled to retain in our hands until all matters

have been adjusted between the two companies and ourselves, the two funds of $978.64 and $1,265.38 (Clause 11 "Agreed Statement of Facts"—43 Rec.), collected by our client, subsequent to the bankruptcy petitions, from the Chair Company and Reed Company accounts receivable.

And: (d) We urge as error (Fifteenth and Sixteenth Assignments of Error—79 Rec.), the failure of the Courts below to adjudge us "the owner of and entitled to control and collect the remaining outstanding and uncollected accounts" of the Chair Company and Reed Company, respectively, shown to be $2,364.34 and $616.56, respectively (Clause 13 of "Agreed Statement of Facts"—43 Rec.), and the failure to deny to said McChesney, Trustee, any "right, claim or title thereto," except such right as a final casting of accounts might show said Trustee to be entitled.

And we further urge as error: (e) That the decree was in error in refusing to allow us, out of the assets in the hands of the Trustee, the sum of $800, which we paid to E. Manning, the "Attorney-In-Fact," mutually agreed upon between the bankrupt corporations, and our client, to handle the accounts in question.

ARGUMENT.

Now, then, what has this Court before it for decision? As we view it, it has presented for its construction a simple contract with certain very simple transactions thereunder.

We submit that *upon its face* the said contract clearly indicates an *intention* on the part of the respective bankrupt Companies *to sell* to the Home Bond Company, and an agreement by the Home Bond Company *to buy* from the respective bankrupt corporations, the accounts receivable in question. And under well settled doctrine, such a contract as the one at bar is a *valid* one unless the parties themselves by their transactions have changed the nature and intent thereof, as gathered from the instrument itself.

We say to Your Honors that the proof in this case (as embraced in the "Agreed Statement of Facts"—(40-44 Rec.), instead of militating against the intent of the instrument (as gathered from its terms), really shows more clearly the *purpose* of the parties to *effectuate a Sale* of the accounts receivable, and *not* a pledge thereof.

We believe that when Your Honors shall have carefully considered our contract, have read the aforesaid "Agreed Statement of Facts," and shall have applied to said contract, and transactions thereunder, the Principles of Law well-recognized throughout the country—you will not stamp the dealings between the bankrupt companies and our client as being in *contravention* of the Statutes against usury, and you will *not denounce as illegal that which the parties intended as legal.*

We recognize that it frequently occurs that contracting parties may really and truly intend one thing, but the Law places upon same a different construction—holding that parties intend only those things which are the resultant effect of their acts. We do not believe, however, that any *strained,* or *forced,* construction should be indulged in so as to aid the Trustee's counsel *in his efforts to have the mark of usury branded upon our client's aforesaid contracts.*

Remember that it is the *well-settled* policy of the Law that (in every instance where it can be done), Courts *should* give to a contract (though doubtful in its terms) *such construction* as will *uphold it as legal,* and *avoid* a construction which would tend to denounce the contract as illegal. In other words, wherever "a *valid effect can* be given," such effect *will* be given. See

Hobbs v. McLean, 117 U. S. 576;
U. S. v. Central Pacific, 118 U. S. 235;
Red Rock v. Henry, 106 U. S. 596;
Lorillord v. Clyde, 86 N. Y. 384;
Curtis v. Gokey, 68 Ky. 300;
Mandal v. Mandal, 28 La. Ann. 556;
Cyc. Vol. 39, pages 917-918;
Succession of Jenkins, 5 La. Ann. 682;
Archibald v. Thomas, 3 Cowen (N. Y.), 284;

In Re: Canfield, 193 Fed. 934;
Houghton, Receiver, v. Burden, 228 U. S. 161 (57 Law Ed. 780).

From the above authorities will be gathered the following well-settled rule and sound doctrine announced in a number of them, as follows:

> *"It is a rule of interpretation that where a contract is fairly open to two constructions, by one of which it would be lawful, and the other unlawful, the former must be adopted."*

Likewise, the Courts will invariably construe an agreement so as to give same a *legal* effect rather than a usurious one. The general rule is thus well announced in

Cyc., Vol. 39, pages 917-918:

> "If *two* reasonable constructions are possible, *by one of which the contract will be legal and valid*, while by the other it will be usurious and invalid, *the court will always adopt the former. In short the general rule of interpretation and construction of* such contracts may be said to be that the contract is *not* usurious *when it may be explained on any other hypothesis."*

This doctrine is supported by numerous cases throughout the country.

In the Succession of Jenkins case, *supra,* you will find the following language employed:

> *"Usury is a violation of law, and a violation of law is not to be presumed.* * * * Even where an agreement for interest is before a Court, and is susceptible of two constructions, one of which would bring it within the Statutes against usury, *and the other would not, a Court would adopt the latter.* (Citing authorities)."

In the Archibald v. Thomas case, *supra,* where the Statute against usury was involved, the Court said (page 289):

> "If the condition is susceptible of a fair construction, not at variance with the statute, *it is the duty of the Court so to construe it."*

Right at the outset, Your Honors will bear in mind that the Home Bond Company in its dealings with the American Fibre Reed Company and New England Chair Company, did *not* occupy the attitude of an oppressive money lender in transactions with indigent workingmen. Courts are quick to go to the relief of this improvident class, which, because of necessity, is forced to seek aid from such "lenders," who unconscionably take advantage of the situation of the borrowers, and indulge in exactions of usury. Many of the States have passed stringent laws to aid the improvident in their warfare against the money lender, and so aggressive has become the warfare of the Courts and State Legislatures against this class of persons, that they have become generally known in the books as "loan sharks."

To say that because it is admitted (Clause 18 "Agreed Statement of Facts"—Page 44 Rec.), that

> "at the time of the execution of the contract of March 6, 1911, the New England Chair Company was without working capital, and was in need of ready money with which to pay the expenses incident to carrying on its business; that on November 9, 1911, the American Fibre Reed Company was without working capital, and was in need of ready money with which to meet the expenses incident to carrying on its business"

said situation places the said two corporations in the attitude of indigent persons seeking aid from a loan shark—is *ridiculous* in the extreme when you come to regard the *extensive* dealings of these two Companies, the fact that they were *officered by capable and efficient men*, and the fact that they were *carrying on a large business*, as shown by the Record, herein, and especially when you come to consider (last two sentences of aforesaid Clause 18 "Agreed Statement")—

> *"that at said times, said two companies represented to the Home Bond Company that they were solvent."*

Remember that it is on just such occasions as those indicated in the aforesaid Clause 18, "Agreed Statement," that an individual or concern, seeks to *obtain the benefit of its ownership of*

accounts receivable by selling same to just such a Company as our client. Of course, if a Company had plenty of "working capital," it might have no necessity of even going to its bank for the usual loans and line of credit. But Your Honors can readily understand that it frequently occurs that a concern engaged in a large manufacturing enterprise—such as these two bankrupt corporations—might *exhaust* its line of credit at the bank, and still be without sufficient *ready* money to operate. Your Honors know that a manufacturing establishment has certain fixed overhead charges which it must meet right along—chief of which is the moneys which it must pay out for its labor and money which it must expend for its raw material. And you further know that in the ordinary run of business matters, banks are inclined to be *rigid* in the matter of security taken by them, *and will neither loan upon, nor buy, "Accounts Receivable."*

Would it be proper to *deny* to an individual the right to *utilize this very large asset*, viz: Accounts Receivable—if it could find a concern that could afford to *buy* same? And so this very condition of affairs, that is to be found in all sections of the country, has brought into existence just such character of business as our client has been conducting. And the fact that the Courts have *not* frequently heretofore had to deal with just such contracts, is due to the fact that Companies like our client are of comparatively *recent origin*. And it is especially for that reason that we are asking Your Honors to give the *instant case* careful thought and study, so that this *perfectly legitimate, new industry* may *not* be handicapped by an adverse decision resulting from any hurried or carelessly reasoned opinion.

Our opponent argues that our deduction of 5 per cent., in Purchasing "120 day" accounts, is exorbitant and therefore indicative of usury.

But we want Your Honors to stop and consider *this situation* for just one moment. To illustrate: Suppose the Chair Company had a claim against one John Smith for $100.00, which would *not* be due from him for 120 days to come. Let us say that the Chair Company's margin of profit in said account would

be $15.00. In other words, the account would have cost the Chair Company $85.00. Does it sound at all unbusinesslike for the Chair Company to take this $100.00 account (in which it has a margin of profit of $15.00)—but which account it cannot expect to get its hands on until 120 days thereafter—and sell same to our client at a discount of $5.00?

It is true that under the arrangements set forth in our contract, the Chair Company would obtain at the time of sale but $75.00 on such an account, and would be postponed as to the remaining $20.00 until 120 days thereafter, viz: until after the account was collected by our client through its Attorney-in-Fact —this $20.00 being to protect against deductions, which, experience has taught, customers so frequently make because of alleged breakages, shortages, etc. But do not overlook this very important fact, viz: that with the above $75.00 in its pocket, the Chair Company could bring into existence *another* Account Receivable, which would *earn* it money. Why doesn't it stand to reason—and it is quite clear without any elaborate and intimate knowledge of business affairs—that if the arrangement set forth in our Contract of Sale and Purchase of said Accounts Receivable, was not *mutually beneficial* to both the seller of the accounts, viz: the Chair Company, and Reed Company, and the buyer, viz: Home Bond Company, that such business as ours could not long be carried on? *Both parties were competent, careful business concerns,* fully capable of entering into contracts concerning such an item as an Account Receivable, *or a large number of Accounts Receivable,* without calling for the aid of a "curator, committee, or guardian." *We must attribute to each of the contracting parties some modicum of business intellect and foresight.*

It will be observed that in the short space of time between March 6, 1911, and November 9, 1911, our client dealt in $109,423.98 worth of Chair Company Accounts Receivable, and that it paid to said Chair Company, at the times of said purchases, a total of $82,067.98 (Clause 5 "Agreed Statement of Facts"—Page 42 Rec.), and that between November 9, 1911, and Feb-

ruary 2, 1912 (the date of the filing of the bankruptcy petitions herein), it handled $18,045.76 worth of Reed Company Accounts Receivable, and that it paid said Reed Company on same the sum of $13,534.32 (Clause 6 "Agreed Statement of Facts"—Page 42 Rec.). *Does this look like the dealings of an exacting loan shark with an improvident workingman?* Or is it not clearly a *legitimate, square business transaction between a large moneyed concern, on the one hand, and an extensive manufacturing establishment, on the other?* Of course, we do not mean to argue that the "largeness" of the transactions between our client, on the one side, and the Chair Company and Reed Company, on the other, is of itself sufficient to take the case out of the application of well-settled doctrines of Law, or Equity, and we do not wish to be regarded as arguing that because a transaction happens to be large in the amount of money involved—the Court should not deal therewith in the same spirit of fairness and justice, as it would with a smaller transaction. But we *do* say that *in the present instance* the amounts involved are of the very *essence* of the transactions themselves, and afford great aid to the judicial interpretation of the contracts in question, and are *proper elements* to be borne in mind when construing these particular contracts and transactions—and it is only because of this all-important position of said transactions that we have drawn Your Honors' attention to the said *large amounts* involved.

Let us see what argument counsel for Trustee presents in support of his efforts to have this Court force a construction which would stamp as *illegal* a contract, which purports to be *legal,* and which *the parties thereto—dealing at arms' length—intended to be legal and to effectuate certain purposes.* He dwells upon the denunciations which different Courts at different times have very properly directed toward usurious transactions, and he cites numerous authorities holding that certain specific transactions therein involved were but "devices" or "shifts" to take more in the way of interest for the loan of money, than the Law permits. And he would have Your Honors apply to the *concrete case at bar* the

principles which other Courts, with specific instances before them, applied to said specific cases.

We subscribe most cheerfully to the *abstract* legal propositions concerning usurious loans of money to which our opponent has directed attention. We all concede (as announced in the Kittle case, 2 Fed. 113, from which our opponent quoted below), that

> "any agreement, device, or shift to reserve or take more than the Law permits for use of money loaned, is usury,"

but Your Honors must bear in mind that *that very case* announces concerning the contract before it,

> "whether by such means more than the legal rate of interest has been contracted for, *is a question of fact to be collected from the whole of the transaction as it passed between the parties.*"

We know that Your Honors, in construing the contract at bar, will not be swayed by the virility and force of *legal abstractions*, concerning "usury." You are not in the position of the Western jury which condemned an alleged horse-thief to be hung, and when reproved by the Court for its verdict upon the scant and practically insufficient evidence against the accused, answered, through its foreman, thus: "It is true, Your Honor, there was *no* testimony against the Defendant, but the Law is so *mighty durn strong.*"

We are not unmindful of the many cases—some of which are cited by opposing counsel—where one involved in debt solicits a supposed friend to buy in his property, which, perchance, is being sold under mortgage foreclosure, or execution, and the friend does so and takes an absolute deed therefor, with the understanding that said oppressed debtor in time may redeem the property in question—but the friend proves faithless, and a Court of Equity is compelled to interpose and declare the deed—although absolute on its face—in effect, a mortgage to secure a loan of money with illegal interest. Courts will permit parol evidence to be introduced to show that the conveyance was intended as a mortgage, and not as an absolute deed.

We are also not unmindful of the "shift" frequently indulged in when a borrower of money makes an apparent sale to the lender of some article then owned by him (the borrower), and enters into an agreement to buy back said property at some future date at a largely enhanced price. The Courts have almost unanimously held such an agreement as being but a loan of money with an effort to collect usury.

The case at bar, however, presents *no* such situation as those indicated in the above list of cases. Not at all. It presents *none* of the elements of any of the above supposed cases and contains *none* of their features unless the very strained and far-fetched reasonings of our opponent are to be given weight. Rather the instant contract is met with and comes within the purview of the reasoning of the Circuit Court of Appeals, Second Circuit, in its opinion.

In re: Canfield, 193 Fed. 934 (113 C. C. A., 562),

which Opinion was *affirmed* by this Court, in

Chas. R. Houghton, Receiver, v. Wm. H. Burden, 228 U. S. 161 (33 Sup. Ct. Reports 491) (57 L. Ed. 780).

While it is true that in the Canfield case the contract there under consideration was admittedly one involving the loan of money—still the same contention was there made by the Trustee as is here being made, viz: that the contract involved a usurious loan of money. But both the Circuit Court of Appeals for the Second Circuit, and this Court, *refused* to hold the contract as usurious and invalid *on its face,* and went even farther, and in spite of rather strong testimony indicating that the loan in question embraced usury—*refused to so hold.*

Let us look at the *Canfield case* as presented to the Circuit Court of Appeals (193 Fed. 934). Abram L. Canfield was the bankrupt. William H. Burden was the claimant of the "accounts receivable." Canfield and Burden entered into a contract on December 14, 1910, which Your Honors will find copied in full in the above reported case (193 Fed.). Many of its provisions bear *close resemblance*

to the provisions of the instant contract, and we ask Your Honors' comparison of the two contracts and urge that the Canfield contract, having been upheld on its face and declared *free of usury*, there is *no* reason that can be suggested why our contract should not be likewise so held.

If the Court in the Canfield case had looked altogether to the contract and the wording thereof so as to ascertain whether same constituted an enforceable agreement between Canfield and Burden concerning the accounts receivable in question, or was merely an arrangement to permit Burden to loan Canfield money at illegal rates of interest—then, unquestionably, the Canfield case would have presented a far stronger situation in favor of the Trustee than does the case at bar.

We insist that in the case at bar, our contract is much clearer, and more certain, than was the contract in the Canfield case. It will be observed that in the Canfield case, the contract entered into on December 14, 1910, was in existence but shortly over a month when on January 18, 1911, a petition in bankruptcy was filed against Canfield. Burden intervened in the bankruptcy proceedings and claimed the Accounts Receivable.

> "The Special Master and District Judge both held that the agreement was usurious and an order was entered denying the prayer of Burden's petition and directing that Burden reassign to the Receiver all the accounts assigned as aforesaid to him by the bankrupt."

It will be observed that the Receiver, in opposition to Burden's petition, introduced the testimony of Canfield and one Herzog, to the effect that it was understood between Burden and Canfield that the agreement in question was simply to collect (by indirection) illegal interest. In fact, Canfield testified (page 937), that Burden in explanation of certain clauses of the contract, said that they were

> "simply to get around the usury law; there was no service to be rendered at all;"

and furthermore, Canfield testified that

> "there were no services rendered."

The Court held:

> *"The instrument being perfectly valid upon its face, and the taking of usury being a crime, the burden was strongly upon the trustee to prove his contention in that regard."*

It is true that in this State the taking of usury is not made a crime, but nevertheless, the taking thereof is declared *illegal, and is in violation of an express Statute.* (See 2219 Ky. Statutes, *supra.*)

We further quote from the Opinion as follows:

> "There is no pretense that Burden was non compos mentis at the time, *and yet it is difficult to believe that any rational being would have gone to the trouble and expense of having this elaborate agreement prepared for the purpose of avoiding the usury law* and at the same time admit to the only man who could interpose the defense of usury that it was a void agreement. So far as the validity of the agreement is concerned Burden might as well have stamped in red ink on its face the words 'void for usury.'
>
> "We must assume that Burden is a man of ordinary common sense, but in order to find that he made the statement quoted, we must convict him of stupidity which is unique in its originality. It is difficult to imagine that a rational being would procure a safe to protect him from burglary and immediately send the 'combination' to the burglar whom he had most reason to dread."

Now, then, upon appeal to this Court, the above ruling was *affirmed* in Houghton v. Burden, *supra.*

Your Honors *not only refused* to construe the contract, there in question, as usurious upon its face, but *even declined* to hold same as usurious notwithstanding some rather *strong affirmative* evidence to that effect.

Were the contention of opposing counsel, with reference to the instant contract, a correct one, viz: he argues that the said contract on its face shows its usurious character—surely the aforesaid Circuit Court of Appeals and this Court would have so held as to the charge of usury against said Canfield contract and would not have been compelled to go into the question of evidence and then find against the evidence. Said courts would have simply construed the contract on its face as being objectionable because

of the alleged illegal exaction of interest. Neither of said Courts *regarded as of merit* any contention against the contract as it stood, but both of them permitted direct evidence to be introduced as to the contention of Canfield that it was understood that the arrangement was but to cloak usury, *and in spite of such direct evidence, held against the plea.*

This Court in Houghton v. Burden, said (P. 780 of 57 Law Ed.—Syllabus No. 4):

> *"The defense of usury to a suit upon a contract, fair on its face, must be established by clear and satisfactory evidence."*

On pages 782-783 of the aforesaid Law Edition will be found the following:

> "Coming now to the merits. The single question is one of usury in the contract. * * * The contract is elaborate and too lengthy to be set out in full."

As we have heretofore stated, Your Honors will find said contract set out in full in the reported Opinion of the aforesaid Circuit Court of Appeals (193 Fed. 934—113 C. C. A. 562). On page 783 of its Opinion the Supreme Court speaks as follows with reference to the contract—and, as we regard them, these words are *all controlling* in the present controversy, viz:

> *"That this contract upon its face is absolutely legal, there can be no serious doubt."*

This Court proceeds to show that Canfield "guaranteed" the payment of the accounts, and yet did not treat this provision as so "monstrous" as to invalidate the contract as usurious—such being the *main* contention of opposing counsel in the case at bar. After holding that oral evidence was permissible to attack the contract, but holding that said evidence *failed* to sustain Canfield's plea that the arrangement was but one to cloak usury—Your Honors again say (page 784), and we wish you to bear same in mind as conclusive of the present case:

> *"The instrument upon its face is not usurious."*

In the case at bar the Trustee's counsel is endeavoring to have Your Honors say that the instant contract is usurious "upon its face;" and this Your Honors most assuredly *cannot* do.

This Court said (page 785):

> "The natural presumption is that Burden was endeavoring to put his contract *in such shape* that Canfield could *not* defeat his obligation by the defense of usury."

And so we argue that in the case at bar our client, with large capital involved, was most assuredly endeavoring to enter into a transaction which could *not* be attacked as tainted with usury, and which could *not*, and *did not*, as a matter of fact, embrace *any taint* of usury .

This Court quotes with approval from the Circuit Court of Appeals' Opinion and lays stress upon the very parts of the Opinion to which we referred, *supra*.

We argue without the slightest fear of contradiction *that the facts in the case at bar are far stronger* in favor of our client than were the facts in the Canfield case in favor of the Claimant, Burden; and the provisions of our contract, *and the elaborate work done thereunder* by our client, speak far more strongly in favor of upholding the contract in the sense urged by us, than were the contract and the dealings thereunder in the aforesaid Burden-Canfield case.

Judge Coxe, of the Circuit Court of Appeals, in denying Canfield's contention that Burden had, in effect, admitted that the whole arrangement was one to cover usury, said that if Canfield's contention were to be upheld, Burden might well be designated "non compos mentis," and further that, so far as the contract itself, was concerned, he

> "Might as well have stamped in red ink on its face the words, 'void for usury.'"

And so in the case at bar, we say that if you are to look with favor upon opposing counsel's argument against our contract, you might well say that the officers of our client were "non compos

mentis;" for would you not be saying that, notwithstanding they entered into this elaborate and carefully prepared agreement, and engaged and invested large sums of money in elaborate transactions thereunder—they, then, without rhyme or reason, turned around and nullified the whole thing by actions, which would be, in effect, stamping on their said contract "in red ink on its face, the words, 'void for usury.'"

We especially desire Your Honors' attention to the concluding paragraph of your aforesaid Opinion (page 785), where the following is announced:

> "There are two witnesses against two, *and the burden to make out the usury is strongly upon the appellant.* Stillman v. Northrup, 109 N. Y. 473, 478, 17 N. E. 739; White v. Benjamin, 138 N. Y. 623, 624, 33 N. E. 1037. In the case last cited, it was said: *'Usury is a crime; and he who alleges it as a defense to an obligation must establish it by clear and satisfactory evidence.'*
>
> "This the appellant has *not* done."

And while it is true that usury is not a "crime" in the State of Kentucky, still nevertheless it is a course of business dealing *inhibited* by Statute (Sec. 2218 and Sec. 2219 Ky. Statutes, *supra*), and has been denounced most vigorously and in no uncertain terms by our various Courts, both high and low. Our Courts have not hesitated to deprive the exactor of illegal interest of every possible benefit that could accrue to him. To demand and receive usury is in Kentucky a *prohibited and forbidden thing.* Your Honors' Opinion in Houghton v. Burden should be regarded as *conclusive* of the present Appeal *in our favor.*

While it is true that neither the Appellate nor this Court in your Opinions expressly refer to Clause 6 of the Canfield-Burden agreement—*which clause in principle and terms is exactly analogous to the fourth clause of the contract in the case at bar,* viz: the "guaranty" clause—still Your Honors must remember that the Courts having such a clause before them and construing the agreement in its entirety, saw fit *not* to permit said *particular clause* to influence them to declare the agreement as a usurious loan con-

tract, and not a valid loan contract, and, therefore, they construed said clause *adversely* to the contention of the Trustee, *just as much so as if they had said so in so many words.*

It will be observed that the chief ground upon which the Special Master in the instant case upheld the Trustee in his contention that our contract was a "loan contract tainted with usury," and not an absolute sale contract—is pitched upon Clause 4 thereof, which reads as follows:

> "FOURTH: Said first party hereby guarantees the payment to the second party or its assigns of all accounts purchased hereunder according to the terms thereof. In the event of non-payment at maturity to said second party, of any accounts purchased as aforesaid, or should the debtor become insolvent, said first party hereby covenants and agrees to repurchase said accounts within five days after receipt of written notice thereof, and to pay therefor the same amount paid to the first party by said second party, plus the discount provided for in the first paragraph of this contract; said second party is hereby given the right without notice to said first party to credit any moneys coming into its possession, belonging to said first party, on its accounts."

In the Canfield-Burden agreement, Clause 6 reads as follows:

> "The party of the first part hereby guarantees that each account so to be assigned will be paid within ten days after the same shall become due, and if any such account shall not be so paid, the party of the first part shall pay to the party of the second part the full amount thereof, after ten days' notice in writing, and thereupon the party of the second part shall reassign the same to the party of the first part; and if the party of the first part shall fail to so pay the amount of any such unpaid account, the party of the second part, at his election, may revoke the agency of the party of the first part to collect any of said accounts then uncollected."

And yet both the Appellate and this Court in said Canfield case, with such a "guaranty" clause before it as is embraced in the above Clause 6, paid no heed to same as in any wise having any bearing upon the agreement in question or of changing the nature and character of the contract in question.

Cyc., Vol. 39, Page 919, says:

> "To constitute the offense of usury, there must be an *intent* to do something which is in violation of the Statute."

We submit to Your Honors that nothing in our contract contained, and nothing in the conduct of the parties in the transactions thereunder, are sufficient in any degree to impute to either the bankrupt companies, or to our client, "an *intent*" to violate the Statute against usury.

The Appellate Court below (Sixth Circuit), in its "Per Curiam" opinion, said:

> "The record discloses to us a mutual intendment that the right at least to twenty per cent. of the full value of each of the accounts receivable was always to remain in the bankrupts, except only for the purposes of security; this right could not be both sold and owned by the bankrupts." (Pages 75-76 Rec.)

We submit that this view of the Court below is *wholly erroneous*, and no possible construction of the contract in question or the transactions thereunder, could possibly distort the state of facts existing, into any such situation as that suggested by the above excerpt from the Appellate Court's Opinion.

We submit that it is perfectly clear that the twenty per centum in question was but a fair amount for the purchaser of these accounts to hold back, as security for the "guaranty of quality" on the part of the vendors, the aforesaid Chair Company and Reed Company. When they sold us an account receivable and we bought same at a 5% discount, they guaranteed that the account was owing and that their customer would pay same without deductions or offsets, and as an evidence of their said guaranty, they permitted 20% of the purchase price to remain outstanding to secure against their default in the matter of said guaranty or warranty.

It will not do to say that this 20% "was always to remain in the bankrupts," or was to ever remain in the bankrupts. The contract, and the transactions thereunder, shows clearly that this 20% belonged absolutely to our client as the purchaser thereof. It belonged in no sense to the bankrupt companies. *It was our*

property. And merely because we paid over the remaining 20% due on the contract of purchase, *only after the vendees' "warranty of quality" had been complied with,* did not subject our contract to the above construction.

We submit to Your Honors that the Court below is wholly in error in its laying stress, for any reason, upon said "20%." As shown above, the bankrupt companies had absolutely no equity therein. We bought each account at a certain price, and the account thereupon became our sole property. Not only the 75% paid to the Company at the time, but the 25%. Each part of said account belonged to us. It is true that we hold back 20% of the *agreed purchase price* until the vendees' warranties and guaranties had been fulfilled. This was but a fair, reasonable mode of security. To denounce the taking by prudent business men of liens and securities, by holding the bugaboo of "usury" over them, will not do.

The Special Master, the District Court and the Appellate Court—and our opponent in argument here—all lay great stress upon the fact that the New England Chair Company and American Fibre Reed Company, in selling these accounts receivable to us, guaranteed the validity or "quality" of said accounts receivable. In other words, they guaranteed that the account was due and owing from a customer to them; that same was subject to no deductions, nor offsets, nor discounts, and that same would be paid. It is argued that this "guaranty" infects our purchase with the vice of usury. *We say, not so.*

Cyc., Vol. 39, page 934,

after indicating the views which prevail in certain jurisdictions concerning the fact that the vendor endorses, or guarantees, the accounts sold, says:

> *"But in accordance with the clear weight of authority, such a transaction is regarded as a valid sale of a chattel with a warranty of its soundness, and the purchaser is allowed to enforce the obligation to its full extent against his own endorser and all prior parties."*

This Court, in its early history, held—

Lloyd v. Scott, 4 Peters 205 (7 Law Ed. 833),

that:

> "The requisites to form an usurious transaction are: 1. *A loan,* either express or implied. 2. *An understanding that the money lent* shall or may be returned. 3. That a greater rate of interest than is allowed by the Statute shall be paid. *The intent with which the act is done, is an important ingredient to constitute this offense.*"

In the case of

McAleese v. Goodwin, 69 Fed. 759,

the Circuit Court of Appeals for the Eighth Circuit—having before it a case where certain obligations were attacked for alleged usury, said (P. 761):

> "It is necessary to overcome this written evidence, and the *legal presumption* that the parties to them have *not* violated the law, in order to establish the charge of usury, *and this requires strong proof.* Bank v. Waggener, 9 Pet. 378, 379; Hotel Co. v. Wade, 97 U. S. 23; Call v. Palmer, 116 U. S. 98, 101, 102, 6 Sup. Ct. 301. *The burden of making this proof rested upon the appellant in this case.* Olmstead v. Security Co., 11 Neb. 487, 9 N. W. 650. His defense of usury must fail, *unless he established by a preponderance of proof* that Mancourt was the agent of the appellant, *and that the usurious agreement was made.*"

An interesting case, and one which, in our opinion, should be read with a great deal of interest here, is that of

Gunby v. Armstrong, 133 Fed. 417, (Fifth Circuit Court of Appeals.)

In that case Gunby was a borrower from a certain building and loan association, and was, likewise, a stockholder therein. He contended that the whole arrangement of loan and subscribing for stock in said Company, and the method of paying therefor—all being read together—worked out a loan of money at usurious interest. The aforesaid Court denied this contention, saying (P. 432):

> "The note executed by the appellant is, *upon its face,* free from usury. He became a borrower of the association's

funds, and in a *distinct capacity*, a subscriber of its stock. *Under such circumstances, it is the duty of the Court to so construe the contracts as to make them legal, rather than to set them aside as unlawful. * * * The Court has no right to depart from the terms in which the contract is expressed, to make illegal what the parties themselves have made lawful.* At page 614, 94 Tex., and page 861, 63 S. W,. the Justice further said:

'If the transaction was such as to render the intention of the parties doubtful, the Court *would adopt that construction which would attribute to them a legal intention;* but we cannot adopt any method for the solution of this question by which we must arrive at a different result from that shown by the contract, *because it is impossible to conceive of the parties having an intention to use certain forms of contract that would produce a result different from that which they embodied in the contract actually made.'"*

And so in the instant case, we contend that every effort should be made by this Court to carry out what the parties themselves desired to do. And merely because the financial status of the Chair Company and the Reed Company have changed is no reason why their agreements should be so altered as to taint them with viciousness, when such was never intended.

In the instant case the Special Master cites (47 Rec.) an isolated, fragmentary rule from 35 Cyc. 40, to the effect that a transaction will be deemed a mortgage and not a sale, "if there is a right reserved by the buyer to demand and enforce re-payment." But when you come to examine the text, you will find the writer is supported by the *single* case of Robinson v. Farnelly, 16 Ala. 472, which was handed down during the early history of the Courts of Alabama. This case runs counter to a number of much later Alabama cases—in effect, being *overruled* even in that State.

Thus in the case of

Capital v. Quinn, 73 Ala. 558,

the payee of a note sold the same "at a heavy discount." The plea of usury was made, which the Court denied. In the course of its Opinion, the Court employs the following language:

"The first inquiry arising * * * is whether the contract, by which the plaintiff acquired the bills from the payees, is usurious. * * * That contract was fair in all its parts; there was no loan of money, or forbearance of a debt, for which any greater rate of interest was promised, or exacted, than that which the Law authorizes. A note or bill which in the hands of the holder is a valid debt, *may be bought or sold as any other chattel, at its real or supposed value, and the transfer of such a note or bill at a discount beyond the legal rate of interest, is not usurious, although the holder may endorse it;* unless the transaction was a mere device to evade the Statute against usury. (Citing authorities.) This principle may be regarded as settled * * * it is supported by the great weight of authorities which are too numerous for special citation. * * * This bill was not drawn, or accepted for the purpose of raising money. * * * The right to sell the bill at such a discount from the sum expressed upon its face, as they (payees) chose to accept, was as absolute and unqualified as their right to sell any other chattel which they may have owned."

The principles announced in the Quinn case, *supra* (73 Ala.), were followed and upheld in the subsequent cases of

Wildsmith v. Tracy, 80 Ala. 261;
Orr v. Sparkman, 120 Ala. 9.

So that Your Honors will observe that even in Alabama the doctrine that the mere "guaranty" by the seller of an Account Receivable transforms the transaction from a sale into a "loan," has been *repudiated* and overturned. It seems to us that all this argument that the "guaranty" by the seller of an Account Receivable, ipso facto, transforms the transaction from a sale contract to a loan contract, arises because of the character of the property involved in the transaction. Had the subject matter of the dealings between the Chair and Reed Companies, on the one side, and the Home Bond Company, on the other, been one involving some *tangible* article, such as a horse, or an automobile—the above argument would *not* have been made for one moment. Suppose the Chair Company had sold our client a horse for a given price with a guaranty that he was capable of doing certain work; or suppose that it had sold our client an automobile with a guaranty that same could be operated at a certain speed by the use of cer-

tain quantities of gasoline, and suppose the seller (Chair Company) had agreed to re-purchase said articles if the conditions were not fulfilled. We do not believe that there would be even the slightest suggestion made that the title to the horse, or automobile, did not pass from the Chair Company to our client—merely because of the existence of the aforesaid "guaranty."

The legal principles applicable in such instances as those just supposed, are *equally logical* where the subject matter of the transaction is a chose in action.

The Chair Company guaranteed said accounts as being genuine, and free from any set-offs or counter-claims on the part of the debtors of the Chair Company, viz: its customers. Now, then, whenever it developed that a certain Account Receivable was subject to deduction, or was not collectible, or was not genuine, is there any reason why the seller should not be made to respond to an absolute guaranty concerning same? This absolute guaranty, or express warranty, as contained in the fourth clause of the contract at bar, is of no greater efficacy, and is of no higher dignity, than the warranty which the Law would imply in the absence of any express language, and even in the absence altogether of Clause four. Suppose Clause four were missing from our contract, and it developed that an account, say against John Smith, for $100.00, was fictitious, or that if it had been valid that John Smith had just set-offs, or counter-claims, which would completely wipe it out—would not the Law require the Chair Company to pay (or repurchase), upon "an implied warranty of genuineness," in the first instance, or "an implied warranty of quality," in the second instance? Merely because the *"thing sold" is an Account Receivable,* instead of an article of merchandise, or any other tangible piece of personalty—will surely not justify the Court in absolving the seller (Chair Company) from the *usual and customary implied warranties* of genuineness, etc. As we view it, there is absolutely *no* difference in principle between the effect of the aforesaid implied warranties, and the express warranty, or guaranty, as contained in Clause 4 of the Agreement at bar.

A case very much in point is the early one of

Oldham v. Turner, 42 Ky. (3 B. M.) 67.

His Honor, Judge Marshall, delivered a splendid, clean-cut Opinion. The facts of the case are shown on the first page of the Opinion (page 67). It seems that Turner had loaned to W. & T. J. White $4,100.00, "and took their note with Oldham as surety." This note was renewed, and (we here quote from Opinion):

> "When this second note fell due, Turner received in payment from the Whites, divers notes, payable to them respectively, giving them credit on the loan for the amount of the several notes received from them."

A note was taken for the balance due on the transaction, and when a judgment was obtained against Oldham, the surety for the Whites, he (Oldham) brought an injunction suit against Turner seeking to have the alleged usury expunged from the aforesaid transaction which formed the basis for the judgment. The Trial Court refused Oldham relief, and he prosecuted an appeal. The Court of Appeals (page 68 Opinion), uses the following language:

> *"It is well settled that the purchase of a note on a third person, at a rate of discount exceeding six per cent. per annum, is not usurious. And the receipt of such notes in payment of a subsisting debt, stands on the same footing.* The form, however, of taking notes by assignment, may doubtless be resorted to as a cover for usury, and when it is, the Statute applies, as in any other case. *Here, the single circumstance relied on as constituting or evidencing a usurious agreement in the assignment, is the covenant of the assignors, in effect warranting the prompt payment of the assigned notes.*
>
> For the undertaking of the borrower in the latter case, is direct and unconditional, and he must be resorted to for the money; *while in the other cases, the undertaking of the vendor is wholly contingent, and may never be liable for the money,* or if he becomes liable, still another may be resorted to for it. Comparing the cases with a view to the question of usury, there is this further difference, that in the one case, there is certainly a loan and a sum secured for its forbearance; *while the other is in form a sale, and cannot be denominated a loan,* unless it be assumed that the sale is a mere pretext, and that the real intention of the parties is, that the pretended vendor, *and not the credit or thing sold, shall be looked to for payment.* Is such were the intent of the transaction, it should

doubtless be considered as a mere device to evade the Statute. But unless the apparent vendor is to be regarded as the *real debtor*, from the first, we *do not* perceive how, *if there be even an advance of money*, the case can be brought within the condition of our Statute, on the ground either of a loan or of the forebearance of a debt.

Does the addition of the assignors covenant to pay immediately, if the maker of the note does not pay it when due, give him the right to demand from the assignee any part of the money which he may receive from the maker of the note, or any sum of money on account of the inadequacy of the price given for the assignment?"

Your Honors will observe how much stronger the facts of the above case support the alleged usury claim than do the facts alleged by the Trustee in the case at bar. In the Oldham case, *supra*, the assignment by the Messrs. White of their choses in action, consisting of notes against various persons, was made to pay an old debt which they owed Turner, and yet the Appellate Court declined to treat said transaction as usurious, and answered adversely the contention made by Oldham that because, forsooth, the Whites remained liable as guarantors of the debts assigned, that this fact made the transaction one of loan, and not one of barter and sale.

Thus Your Honors will observe from the above excerpt that Kentucky's highest Court after announcing this doctrine as being conceded as far back as 1842, viz:

> "It is well settled that the purchase of a note on a third person, is *not* usurious,"

proceeds to say:

> "Here, the single circumstance relied on as constituting or evidencing a usurious agreement in the assignment, is the covenant of the assignors, *in effect warranting the prompt payment of the assigned notes.*"

The Court proceeds to hold this contention of *no* effect and concluding its Opinion on the subject, says (page 71):

> "If it had appeared that the discount upon the assigned notes was greater than usual, that circumstance, connected with the fact that the assignment and covenants annexed, were made in part discharge of a grossly usurious loan,

might be entitled to weight in giving character to the transaction. But the latter fact *alone* does *not*, in our opinion, affect the rights of the parties or the character of the assignments."

The Court was there referring to the *matter of discount*—it having theretofore disposed in favor of Turner the contention that the *guaranty* of the Whites rendered the transaction not one of barter and sale, but one of a mere security, or pledge, for debt. This case of Oldham v. Turner has *never* been modified, or reversed, *and is good law today.*

The argument and reasoning in the case of

Durant v. Banta, 27 N. J. L. 624,

is strikingly in point here on the "guaranty" question.

We argue that if the "guaranty" (Clause 4 of our contract) did not exist, and we did not have the protection of the "lien" arrangement contained in said Clause 4 we could *not* afford to buy the accounts at the *small* discount at which we did buy them, viz: 5 per cent. for 120 day accounts, and that had we been compelled to buy the accounts "without recourse," we would have necessarily demanded a very large discount, possibly 33⅓ to 50 per cent. of the face of the said accounts.

And so in the above New Jersey case, viz: Durant v. Banta, we find that the main contention of the Defendant was that the sale of the note in question, being at a large discount and being *guaranteed* by him, rendered the transaction a usurious loan arrangement.

The Court denied this contention, held same fallacious and said:

"His dominion over it is perfect. He may barter, exchange, or give it away, as he pleases. He has certainly the same legal right to sell it, that he has to sell anything else that is his; and there is not a word in the act of usury which indicates a design to limit or interfere with that right. * * * But the argument is he must *not guarantee it. Practically that is depriving him of the benefit of his credit* and character in the disposition of that description of property—saying to him: 'True the note is yours and you may sell it, like any other

> chattel, for what it will bring; but you shall not guarantee its ultimate payment if you sell it below par. *You may sell it for 50 per cent. discount without recourse, but you shall not sell it at 7 per cent. per annum discount if you give the additional value of your endorsement.'"*

The Court proceeds to make light of such a contention as that just indicated, and we think most properly so. And we ask Your Honors' special attention to how forceful the above reasoning of the New Jersey Court applies to the instant case.

In concluding its Opinion, the Court in the New Jersey case says (*and so we say here*):

> *"It is going too far to ignore facts and draw a legal conclusion contrary to the facts, for the purpose of bringing the case within the operation of the statutory penalty against usury."*

In the case of

Centrell v. Ford, 46 S. W. (Tenn.) 581,

the Defendant sold and assigned to the plaintiff certain claims for fees due from various parties. These claims were mere choses in action of a non-negotiable character, just as are the Accounts Receivable at bar. They were sold at a 15 to 20 per cent. discount, and defendant *guaranteed* the payment of the claims by the debtors. Plaintiff was unable to collect for various reasons, and thereupon called upon defendant to make good his guaranty. Defendant gave Plaintiff a note for $950.00 and in a suit upon said note "set up the defense of usury." The Tennessee Court *rejected* this plea and held that the transaction *constituted a sale*, and gave plaintiff judgment in full.

A very striking case is that of

Leavitt v. Delaney, 4 N. Y. 364.

The subject of sale was a Bill of Exchange. The plea of usury was interposed, but disallowed. The Court said:

> "Regarding the transactions set forth in the pleadings as sales of exchange, there can be no doubt they are free from usury. *Foreign exchange is a commodity, which may be*

bought and sold like merchandise. * * * The sale of exchange is, in effect, a transfer of funds * * * to the purchaser. * * * *Funds thus situated are the subject of commerce. The owner may sell them for the best price he can obtain without the hazard of having the sale avoided for usury.* (Citing authorities.)."

In the case at bar, the sale of the Accounts Receivable is no *different* in theory than the sale of the "bills of exchange" in the Leavitt case (4 N. Y.), *supra.* In selling the Bill of Exchange, the vendor warrants that there is due him from the drawee the sum therein designated. In selling an Account Receivable, or invoice, the vendor represents that he has due him the sum therein indicated from the debtor therein named. *The sale in either event is a transfer of a fund which the vendor is supposed to have due him from his debtor.* If a negotiable paper may be sold at *any agreed price,* with the seller's *guaranty* thereon, *without having the transaction tainted,* a fortiori should this principle apply to non-negotiable Accounts Receivable? Especially is this true when it is remembered that by the seller of an Account Receivable guaranteeing that it is genuine, and will be paid at maturity by the primary debtor, he is enabled to obtain a far larger price than if he undertook to sell it without such a guaranty, viz: without recourse. Once it becomes conceded that an Account Receivable may be sold the same as any other property—it must likewise become conceded that said account may be sold with a *guaranty* of the "quality of payment." *That an Account Receivable in the State of Kentucky may be sold just exactly like any other species of property, has been academic, elementary law since our Court of Appeals' winter term of* 1859. For said Court in the case of

Newby v. Hill, 59 Ky. (2 Metc.) 530,

said:

"To constitute an equitable *assignment of a debt or other chose in action, no particular form is necessary. Any order, writing, or act which makes an appropriation of the fund, amounts to an equitable assignment of that fund. An assignment of a debt may be by parol as well as by deed.* (Story's

Eq. Jur. Sec. 1047.) *And it is not necessary to consult the debtor.* (Ib. Sec. 1057.)

"The statutes which require the recording of mortgages, etc., of 'real and personal estate,' do *not* embrace choses in action or claims for debts. (4 B. Mon., 448.) This principle has not been changed by the Revised Statutes."

Your Honors will observe that the law requires no particular form for the assignment of "a debt," nor is recordation thereof necessary, and our Appellate Court says: *"It is not necessary to consult the debtor."*

These fundamental principles borne in mind—can there be any legal reasons suggested why large quantities of "debts," viz: Accounts Receivable, may not be assigned? That such assignment is proper, and that manufacturers and large dealers, who wish to secure the benefit of their Accounts Receivable—without undue harassment of the debtors themselves—may sell these accounts to one engaged in that business—has given rise to the very character of business conducted by our client. And merely because the contract in question, and the manner used by the Home Bond Company in its dealings with its customers, or clients, happens to be more elaborate than the simple *oral* assignment in the Newby v. Hill case, *supra*—does not impair the legal rights of the parties. Naturally the simple transactions of former days must give way to more elaborate written agreements when present day methods of financing is taken into consideration.

In the case of

Dickerman v. Day, 31 Iowa 444,

the Court said:

"There appears to be no conflict in the cases—that where a promissory note has been fairly made—so that the payee has acquired a legal right to sue the maker thereon, *he may then dispose of it at any rate of discount from its face*—(Citing cases). The *substance of the transaction is a transfer of the property; a sale and nothing more than a sale. No money is loaned, or borrowed or forborne in any way whatever, and the price or sum paid by the purchaser has nothing whatever to do with the question as one of usury. Such a transaction cannot, therefore, be usurious with any accuracy of interpretation.*"

In the case of

Nichols v. Fearson, 7 Peters (U. S.) 103,

this Court refused the plea of usury, and upheld the transaction, which embraced the purchase of a promissory note at a large discount accompanied with the guaranty of the payee. Your Honors held:

"There could be no usury where there was not a loan,"

and further expressly found that a guaranty of payment by the seller does *not* of necessity make the transaction a loan. In the course of its Opinion, you vigorously denounced

"Converting a sale on a discount into a loan on usury, and thus rendering null and void the act of endorsing it"

as being a course of interpretation which should not be followed. Your Honors employed the following language:

"It is enough to submit to them when they become unavoidable, but it is easy to assign other and adequate motives for selling a note and then endorsing it, without imputing to the transaction the negotiation of a loan; and it is enough if the imputation be *not* unavoidable. *The acts against usury were intended to protect the needy;* but the holder of a note may be wealthy * * * *and yet find an adequate motive for selling a note and then guaranteeing it* * * * his endorsing it will diminish that sacrifice * * * and the inducement for the endorsement may be the conviction that the debt is safe—that he will never have to repay what he has received. *There could be inferred no treaty for a loan from such a transaction, nor any device to evade the Statute. It is a plain contract of bargain and sale, with a warranty of the soundness of the property."*

We think the language employed in the above opinion of this Court (Nichols v. Fearson) can be *aptly used* in the present instance.

In the case of

In re Samuel Wilde's Sons, 133 Fed. 562,

we find the following:

"The party pleading usury has the burden of proof. The Trustee in this case, therefore, in order to maintain his objection, must establish by a preponderance of proof that there was a contract made to take usury."

The following particular facts were then taken up by the Court:

"Where claimants were note brokers, and, as such, had been engaged for a long period in selling the notes of a bankrupt firm, and loaning money on such notes as collateral before they could be sold, *the compensation paid by the firm for such services could not be treated as interest to sustain a defense of usury."*

When Your Honors come to read the case you will find the concrete facts thereof are much stronger in favor of the usury claim than are the facts in the case at bar.

We quote the following from the Court's Opinion (page 565):

"But it seems to me that the evidence established that the excess of money paid over the legal rate of interest, *even if it was sometimes termed interest by the parties, was not interest, and was not understood to be interest.* Bennett & Co. rendered services as note brokers to the bankrupts, for which they were entitled to compensation, and they gave the bankrupts the benefit of their credit at the bank, for which they were entitled to compensation. It is perfectly well settled that parties rendering such services are entitled to compensation for them. Claims of such services may be made a cloak for usury, but, if they were rendered in point of fact, *the compensation for them is not usury."*

Do not overlook the fact that it is established that *the "burden of proof rests on the party pleading usury."* See

Remington on Bankruptcy, Vol. 1, page 697, Section 1199.

We find the following rule announced in

Page on Contracts, Vol. 1, page 741, Sec. 465:

" 'Unless there was a loan there can be no usury.' The usury statutes, therefore, do not apply to a genuine contract for the payment of money in consideration of the sale of property. A genuine contract of sale cannot be treated as usurious even if the price to be paid is in excess of the real value of the property."

Page proceeds to show that a sale is frequently used as a disguise for usury, and says (page 742, Vol. 1):

> "Usually in these forms of usury, the lender acts as vender, the borrower as vendee."

Your Honors will note that this is the situation presented in most of the cases cited by opposing counsel—where the lender agrees to sell back to the borrower the borrower's pledged property at a price which is so largely in excess of the amount which he (the lender), paid for such property, as to make the transaction clearly one of a usurious loan. In the case at bar, this is *not* at all the position. It is not as if the Home Bonding Company had pretended to purchase some of the machinery, or plant, of the American Fibre Reed Company, and then in a contract agreed to sell back said machinery, or plant, to said American Fibre Reed Company, upon its paying a large enhanced sum within a certain time. Such a transaction, the Courts would not hesitate to declare a usurious loan agreement.

Again we find in

Page on Contracts, Vol. 1, page 743, Sec. 477;

the following:

> *"A purchase from the owner thereof, of a note or other obligation given by a third person is not usurious if a genuine sale, even if at such a discount as to exceed the maximum rate of interest, and even if the vendor guarantees payment of such obligation in full."*

Among the cases cited by the writer in support of his above text is the Kentucky case of Oldham v. Turner (42 Ky.), from which we have heretofore freely quoted.

One of the leading cases in support of the above text from Page is the Opinion of this Court in

Struthers v. Drexel, 122 U. S., 487 (30 Law Ed. 1216).

In that case the transaction was in the character of a sale and purchase back of certain stock of the Blair Iron & Steel Company, and the defense was that the arrangement was

> "A mere device or contrivance for obtaining to the plaintiff more than the legal rate of interest for money advanced by way of loan to the above Company."

Your Honors, in holding as correct the instruction of the Trial Court with reference to the question of loan, or no loan, uses the following language:

> "This charge is correct. There is nothing upon the face of the papers to show that the transaction was a loan of money by the Plaintiff to the Defendants, or to the Blair Iron & Steel Company. *Unless there was a loan, there can be no usury.* The bill of exceptions sets out *no* evidence to show the transaction to have been different *from what it appears to be on the face of the papers.*"

And so in the case at bar, we contend that there is not the *slightest* evidence that there was any intention to *loan* between the Home Bond Company, on the one side, and the American Fibre Reed Company and New England Chair Company, on the other, whereby usury could arise. *And as there was no loan, there can be no usury.*

In the case of

Bank of U. S. v. Waggener, 9 Pet., 978;

Your Honors will find the following rule announced:

> "In construing the usury laws, the *uniform construction in England has been, and it is equally applicable here,* that to constitute usury within the prohibitions of law, *there must be an intention, knowingly to contract for, and to take usurious interest. For if neither party intended it, and act bona fide and innocently, the Law will not infer a corrupt agreement.*"

Now then, we contend in the case at bar that the business of our client is one which from its very character has obtained wide recognition, and is a kind of business entirely legitimate and proper. ***Our client has transacted this business on a large scale, and in an ethical manner, without indirection, or concealment. As to this, there can be no dispute.***

Remember, there is not *one scintilla of proof* that the Chair Company or Reed Company was *borrowing* money from our client, or that our client was *lending* money to it with the Accounts Receivable as collateral.

The Trustee urges upon Your Honors to renounce the contract in question entered into between the parties with a *thorough* understanding on both sides of all that was done.

You are asked to do violence to a valid contract, without any evidence or Law justifying your conclusion.

It will not do to hark back to abstract doctrines, or specific instances of oppressive transactions, in order to have the Court *distort* a simple and well understood contract of sale and purchase of Accounts Receivable, into a transaction prohibited by law. As we have heretofore shown (announced and supported by ample authority), *Courts endeavor to uphold contracts and execute them according to the intention of the parties. And this they will always do,* unless some inhibition, or prohibition of Law *clearly* prevents it. And it is the policy of the Courts to endeavor to *reconcile* the conduct of the parties *as running with the Law* instead of counter to it. Do not forget that Laws against usury are *penal in their nature,* and for that reason should be *strictly construed.*

We revert again to the argument that the retention by our client of 20 per cent on each Account Receivable until the same has been actually collected by said Bond Company does in some wise alter the character of the transaction. We do not believe Your Honors will require any extended argument on this proposition, to show the fallacy thereof. The fact that *part* of the *agreed purchase price* of an article remains unpaid, cannot in any wise diminish, or enlarge, the rights of the parties with reference to the nature of the original transaction. Because, forsooth, the Chair Company sold us a $100.00 Account Receivable against, say John Smith, and we agreed to pay him therefor $95.00, of which we paid him $75.00 "cash in hand," and as to the unpaid balance of $20.00, there was an agreement that same should be as a protection of the vendor's express guaranty of "quantity and quality," can it be argued that the arrangement as to said unpaid $20.00 balance in-

validates the entire contract of "purchase and sale"? *Most assuredly not.* Every day sees many transactions of a similar character. And Your Honors well know that were the article in question a horse and had there been no express warranty of quality, and had there been a $20.00 unpaid balance, the vendee—in the event the ordinary implied warranties of Law had failed—would be permitted under the law to retain said $20.00 balance and apply the same toward the damages caused by the vendor's breach of said implied warranties as to the quality, fitness and soundness of said horse. And this proposition, of course, would be much stronger where the parties have by express agreement fixed an express and absolute guaranty and warranty as to the said animal.

And so in the case at bar, the 20% was not an unreasonable amount to retain from each Account Receivable to protect the vendee, viz.: our client, the Home Bond Company, in the matter of the vendor's express and absolute guaranty of both "quantity and quality" of the things which said vendor, viz.: Chair Company and Reed Company, was selling. And so we will pass this phase of the case, feeling most sanguine that Your Honors will have no trouble at all on this particular score.

In a proceeding pending in the United States District Court for the Western District of Michigan (Southern Division), in the matter of American Electric Fuse Company, in Bankruptcy, No. 967, a proposition *identical with the one at bar* was presented before Referee Kirk E. Wicks, of Grand Rapids. The Intervenor was the Commonwealth Commercial Company, a concern engaged in a business identical with ours, and the controversy was exactly similar. The Referee, in a very full and elaborate opinion handed down on September 18, 1912—but which unfortunately has not been reported—found against the Trustee's contention, and in support of the Intervenor, the aforesaid Commonwealth Commercial Company. We have an attested copy of said Opinion before us, but same is full and goes so much in detail as to figures, that we do not wish to burden this already too long Brief with same. But because of its aptness here and the clean cut reasoning thereof, we crave Your Honors' indulgence while we quote such parts thereof as touch upon the legal merits of the controversy.

"The *intention* of the parties is the vital question in determining the character of this contract. *The presumption is that the written instrument itself expresses the intention of the parties.* The articles of incorporation of petitioner did not authorize it to loan money, but by express terms exclude that character of business. The language used in every provision of the contract is that of an *absolute sale of genuine valid accounts receivable;* the assignment executed pursuant to the contract with each account *was also in form an absolute and unconditional sale. The business of purchasing accounts was and is a legal business,* and not subject to the criticism nor the conclusions to be drawn therefrom, as in the Michigan authorities cited by counsel for the Trustee. There is no affirmative showing in this record to indicate that a loan was intended. As a practical interpretation of the contract, the manner in which the business was transacted, the collections made by the agent of petitioner and transferred to it in their original form, would seem to *indicate an absolute ownership* by the petitioner of the proceeds of the accounts. *It seems to me, that this record presents a situation where the principle of when there is doubt as to the construction of the terms of the contract, such a construction should be given as to make it valid, rather than one making it illegal.*

It is urged by counsel for the Trustees that the seventh paragraph of the contract is the one which brands it as one of loan and therefore usurious. This paragraph binds the vendor in the event of a default in payment at maturity of an assigned account, to re-purchase the account at the same price for which it was sold, with interest at a specified rate. I do *not* look upon this section, *standing alone* and without further proof, sufficient to so characterize the contract. It is therefore my opinion that insofar as the accounts transferred were valid and real accounts, the contract and the several assignments resulted in an *absolute sale* of such accounts to the petitioner, and that it is entitled to collect and retain the proceeds and apply the same, so far as necessary, upon the valid but defaulted accounts, under the terms of such contract.

As to the petitioner's right of set-off it is my opinion that there is still owing by the petitioner to the bankrupt estate the remaining unpaid 20 per cent of the purchase price of the assigned valid accounts, *but that under the terms of the contract petitioner has the right to apply such part of the proceeds of these accounts as shall be necessary to satisfy the assigned valid but defaulted accounts; that such valid accounts were the property of the petitioner at the date of filing the petition in bankruptcy, subject only to payment of balance of the purchase price, less defaulted accounts as per contract, and that it had the right to collect the same.*

A case, which, by analogy, seems to us to be quite in point, is that of

Salt Fork Coal Co. vs. Eldridge Coal Co., 170 Ill. App., 268.

It seems that the Eldridge Coal Company purchased from the Salt Fork Coal Company (which was a mining operator), certain shipments of coal, in varying amounts, to be delivered at varying times, and at varying prices—as per a written contract. Thereafter the Salt Fork Coal Company assigned its claim against the Eldridge Coal Company, to the First National Bank, of Danville, Illinois, and said Bank as Assignee of said Salt Fork Coal Company, sued the Eldridge Coal Company for the moneys claimed to be due under the said mining contract. The Eldridge Company made the defense that the Salt Fork Company had breached said contract, and said Eldridge Company was thereby exculpated from any further compliance with said contract. At the trial, a peremptory instruction was given in favor of the Defendant, and upon appeal, same was affirmed.

Many features of the case are not in point here, but such of the questions there considered, which we regard applicable here, are those set out in the Opinion, (P. 275-276), viz:

> "It is also insisted by plaintiff in error that certain advance payments in the form of notes made by defendant in error to the Salt Fork Coal Company, prior to the assignment of the account, cannot be credited to the defendant in error, although the evidence shows that they were accepted by the Salt Fork Coal Company as advance payments. Also, that the agreement between the two coal companies that the *defendant in error was to be allowed on said notes, or advance payments, 5% discount,* is void because in violation of the Statute against usury. These notes were accepted by the Salt Fork Coal Company as advance payments, and immediately endorsed by it and cashed long before the assignment, and were receipted for as payments. They were so given at the request of the Salt Fork Coal Company *in order that it might meet its pay rolls promptly,* which it could *not* do if it waited for the payments for coal until they were due. *We regard the transactions as legal* and that plaintiff in error is bound by the *transactions. The 5% discount allowed on the face of the notes, amounted, in substance, to allowing a 5% discount on the price of the coal for cash payments made before the ac-*

counts were due. Such discounts are commonly made by the mercantile world in all departments where articles of commerce are sold and delivered on account. We regard the transactions as advance payments simply, and *not* as loans."

Note that in the case at bar it is shown, (Clause 18 of "Agreed Statement of Facts," P. 44 Rec.), that at the time these two Companies sold their accounts receivable to the Home Bond Company, they were "without working capital" and were "in need of ready money with which to pay the expenses incident to carrying on" their businesses. Observe, if you will, that they sold said accounts at a discount of varying per cents, in order to obtain this ready cash capital.

The situation is very much like that of the Salt Fork Coal Company. The Court in the Illinois case very properly held that a person owning accounts could well afford to sell them at a discount in order to obtain ready money—and that such a sale did not infect with the vice of usury the transaction in question.

We might well adopt the language of the Illinois Court when it says:

"Such discounts are commonly made by the mercantile world in all departments where articles of commerce are sold and delivered on account."

The logic of the above Opinion—as we view it—bears most strongly in our favor upon the instant controversy.

DISCUSSION OF OPPOSING COUNSEL'S "CITATION OF AUTHORITIES."

It would serve no good purpose to analyze the authorities cited below by our opponent. As we view them—with but two exceptions—said cases do not touch the questions here at issue, either side, edge or bottom. They deal either with abstract propositions of law, or with certain instances where, upon full proof, the Court found an usurious transaction to exist, instead of a contract free from illegal exaction of interest. The facts in them do not in any wise, nor to any extent, resemble the facts in the case at bar.

The only two cases, which our opponent cited in his brief below, which in any wise resemble in some degree the instant case, are those of **In Re: Fishel, 198 Fed. 464, and In Re: Mesibovsky, 200 Fed. 562.** As we read the Opinions in said two cases, however, they not only do not militate against us, but on the other hand, are really in line with In Re: Canfield, *supra,* heretofore cited; and when properly construed, both of these authorities lean strongly in our favor.

You will observe that in the Fishel case, the contract there under consideration, was upheld as a *valid* one, but the "formal agreement" was neutralized by a letter from the borrower to the lender, which indicated that the contract did *not* express the true agreement. This letter was written "before the agreement was executed," and said, in part:

> "The accounts are only to be used as collateral for loans made."

Upon this showing, the Court very properly held that the written agreement was simply a shift to conceal an usurious transaction.

In the Mesibovsky case, the Appellate Court (Second Circuit) distinguished said case from its previous decision of In Re: Fishel, and upheld the contract in question as being valid, stating in effect that as said agreement was *valid on its face,* and as there was no evidence to contradict said agreement, or to overturn same—the said contract should be enforced, and said Appellate Court thereupon reversed both the Referee and the District Judge, who had theretofore held that the contract was tainted with usury.

RESULTS SHOWN BY APPELLANT.

Now, then, we have shown, viz:

(a) A contract which, on its face, is a *valid sale and delivery* of accounts receivable from the Chair Company and Reed Company to the Home Bond Company, and which stands *unimpeached and unassailed by any parol, or extraneous, testimony;*

(b) A Company, viz: our client, Home Bond Company,

not engaged in the loan business, but altogether in the business of "buying from others accounts and bills receivable due them;"

(c) A manufacturing establishment of the character of the Chair Company and Reed Company carrying on extensive operations and officered by men, who must be presumed to have business ability, intellect, and sufficient knowledge of business affairs to take *good care of themselves*:

(d) These two concerns, viz: the Chair Company, or Reed Company, on the one side, and the Home Bond Company, on the other, dealing at arms length with each other;

(e) Transactions of large amounts and involving large details carried on *strictly* under the provisions of the contract in question, and in no wise by indirection, or concealment.

In opposition to this showing, what has our opponent to offer? *Nothing at all, except mere strained surmises, forced conclusions, and illogical results based thereon.* Appellee's counsel would have Your Honors thunder denunciation against this perfectly legitimate business, because, forsooth, they would "wish," on the transactions here at bar, the placing of an illegal taint. They prefer having our contracts branded usurious; and without rhyme or reason, without fact or law, insist that such branding shall be done. We do not believe that this Court will lend ear to any such demand.

RELIEF SOUGHT.

In conclusion we beg to say that we trust that Your Honors will have no hesitancy in upholding the contracts in question, and that the transactions thereunder, as constituting *valid sales* from the Chair Company and Reed Company to the Home Bond Company of the Accounts Receivable embraced in said transactions, and accordingly, will direct the entry of an Order requiring McChesney, Trustee, of the two Bankrupt corporations to turn over *instanter* to our client the sums of $2,845.88 and $2,409.25, respectively (Clause 12 "Agreed Statement of Facts"—43 Rec.), same being the proceeds of Accounts Receivable collected by him, but which are *our* property. And we ask that you *further adjudge* that our client is entitled to hold the two funds of $978.64 and $1,265.38 (Clause 11 "Agreed State-

ment of Facts"—43 Rec.), collected by it, subsequent to the Bankruptcy petitions herein, from the Chair Company and Reed Company Accounts Receivable—until the matter of the "outstanding and uncollected" accounts still in our hands (Clause 13 "Agreed Statement of Facts"—43 Rec.), as to the collectibility or non-collectibility of said accounts is definitely ascertained.

In other words Your Honors will observe (43 Rec.),

> "that there are still outstanding and uncollected of such accounts due the New England Chair Company the sum of $2,364.34, and that there are still outstanding and uncollected of such accounts due the American Fibre Reed Company the sum of $616.56."

The *true value* of these accounts are necessarily *uncertain.*

Under the second clause of the Agreement of our contract it is provided that

> "no payment of the remainder" (of the purchase price) "shall be made while any of said accounts are in default."

And the fourth clause, viz: the "guaranty clause," provides that

> "said second party is hereby given the right without notice to said first party to credit any moneys coming into its possession, belonging to said first party, on its account;"

to make whole and good any losses resulting from the non-collectibility of any accounts purchased. In other words, we would have the right—in the event of any breach of "guaranty" of the Chair Company or Reed Company in the matter of the Accounts Receivable—to use any moneys in our hands belonging to the "first party" toward reimbursing ourselves for any such loss. And inasmuch as the moneys in our hands, as shown by Clause 11 of the "Agreed Statement of Facts," is *less* than the face value of the uncollected accounts, and inasmuch as said uncollected accounts may turn out as absolutely worthless—we contend that we have the right to proceed to collect the remaining of the uncollected accounts, and that the matter of the "reserve" in our hands, as

shown by Clause 11 "Agreed Statement of Facts," must await adjustment until the matter of the uncollected accounts is thoroughly proceeded with.

Now then as to the $800.00 which we paid to E. Manning—the "attorney-in-fact" mutually agreed upon between the bankrupt corporations and our client, to handle the accounts in question—we submit same to Your Honors without much argument, except to say that a fair reading of the Sixth Clause of the Agreement must necessarily leave open but one construction, and that is that if the "first party"—the Chair Company or Reed Company, as the case might be—fails to compensate the said attorney-in-fact, then clearly our client had the right to compensate him and charge same against said Chair Company or Reed Company.

You will observe that the third paragraph of the Sixth Clause of the contract at bar provides that

> *"said party of the first part shall pay unto said attorney-in-fact compensation for all such services so rendered in that behalf;* and that they will furnish and provide for said attorney-in-fact all necessary clerical or stenographic assistance * * * and all postage or express charges for transmitting reports and remittances."

The Special Master disallowed this claim on our part (50-51 Rec.), and although we have carefully read his Opinion touching on said matter, we fail utterly to find any *good* reason therefor.

There seems to have been no question but what $100.00 per month was a fair allowance to Manning for his services. Of course, should Your Honors feel that the matter of the value of his services is still open for inquiry—that is a matter that you can direct shall be inquired into and adjusted at the time that the adjustment of the aforesaid "reserve" in our hands is gone into. What we do ask, however, is that Your Honors hold that we are entitled to have refunded to us moneys which we paid out to Manning for his services—the "party of the first part" having failed to compensate him for "such services so rendered in that behalf."

The Special Master also disallowed the claim of our client for its counsel fee in these proceedings (51 Rec.). We based our said demand upon the 8th Clause of the Agreement, which provides:

> "Should second party employ counsel or cause legal action to be instituted to enforce the payment of any of said accounts, or any part thereof, either in its own name or the name of the party of the first part, then in either case said first party shall immediately pay to said second party, or its assigns, all court costs, expenses, attorney's and stenographer's fees, which may be by it expended in such proceedings."

We contend that this expression is broad enough to embrace not only the counsel fees incurred by our client in the collection of the Accounts Receivable from delinquent debtors, or customers, of the Chair Company or Reed Company, but also to cover the counsel fees incurred by our client *in collecting directly* from the Chair Company or Reed Company any Accounts Receivable which have come into its hands, and for which it—or any Trustee in bankruptcy, of it—fails to account.

We urge upon Your Honors a reversal of the Appellate Court's Opinion, from which we are here appealing, and that you set aside and hold for naught Judge Cochran's decree. And we ask that you direct the entering of a Judgment, giving to our client the relief to which we have heretofore showed that it is properly entitled. We might say that should there be any uncertainty in the minds of this Court as to the correctness of the figures which we have been using in this brief, this matter can be easily controlled by the form of your Mandate. We believe, however, that the fullest relief should be given to Appellant; *that the contracts in question should be enforced according to their tenor;* that this Court should not set itself up to make for the parties a different contract from that *which they, themselves, saw fit to execute. And we ask that the integrity of the contract which they did execute be sustained to the fullest extent.*

Respectfully submitted,

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Louisville, Ky.

Of Counsel:
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S. M. STOCKSLAGER.

No. 90

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Supreme Court of the United States

HOME BOND COMPANY, (Intervenor Below) - Appellant,

vs.

H. V. McCHESNEY, Trustee, etc.,
(Defendant below) - - - - Appellee.

SUPPLEMENTAL BRIEF FOR APPELLANT

S. M. SAPINSKY,
Attorney for Appellant,
Louisville, Ky.

Of Council
JAMES R. DUFFIN,
OWEN D. DUFFIN,
S. M. STOCKSLAGER:

THE STANDARD PRINTING CO., INCORPORATED, LOUISVILLE.

Supreme Court of the United States

THE HOME BOND COMPANY, - - *Appellant,*

Against

H. V. MCCHESNEY, Trustee in Bankruptcy of the Estates of American Fibre Reed Co. and The New England Chair Co., Bankrupts, - - - - - - *Appellee.*

SUPPLEMENTAL BRIEF FOR APPELLANT.

May It Please the Court:

Within the last few days the Supreme Court of Illinois has handed down an opinion in the case of Mercantile Trust Company of Illinois vs. E. H. Kastor, which has not yet appeared in the advance sheets of any of the reporter systems. We have therefore given notice to appellee as per attached form that we would move the Court to file and we now ask leave to file this supplemental brief, simply copying that opinion bodily

herein, adopting as our further argument the reasoning of Mr. Chief Justice Farmer, who wrote the opinion, and directing this Court's attention to the rather remarkable similarity of that case to this. The opinion is as follows:

Mercantile Trust Company of Illinois, - - - - - *Plaintiff in Error,*

vs.

E. H. Kastor, - - - *Defendant in Error.*

Mr. Chief Justice Farmer delivered the opinion of the Court:

This suit was brought by plaintiff in error, the Mercantile Trust Company, an Illinois corporation, as an action of the first class in contract, in the Municipal Court of Chicago, against E. H. Kastor, defendant in error, on a written guaranty made by him that the United States Kellastone Company, an Oklahoma corporation, having its principal place of business at Chicago, would perform a certain written agreement made by it with the plaintiff in error. The Kellastone Company was a manufacturing corporation engaged in manufacturing and selling its product to customers throughout the country. It transferred its accounts with customers to plaintiff in error for amounts agreed upon and guaranteed the payment of the accounts. Defendant in error guaranteed the contract of the Kellastone Company with plaintiff in error, and this suit was brought against him as guarantor, to recover alleged losses to

the plaintiff in error under the agreement. The cause was tried by a jury and resulted in a verdict and judgment for plaintiff in error in the sum of $3,140.12. The Appellate Court for the First District reversed this judgment without remanding the cause, and the case comes to this court by writ of *certiorari*.

The first question to be determined is whether the transaction between plaintiff in error and the Kellastone Company by which that company transferred to plaintiff in error its accounts was a sale of the accounts or whether it was a pledge of the accounts to secure a loan. Plaintiff in error was authorized by its charter, among other things, to buy, sell, hold and own open accounts and choses in action of every kind, but its charter did not authorize it to engage in the business of loaning money. Plaintiff in error contends that it bought the accounts of the Kellastone Company and that the transaction was not a loan. Defendant in error contends that the transaction was not a sale of the accounts, but was a loan at usurious rates of interest, and that it was *ultra vires* and void.

The agreement between the parties as to the terms upon which accounts of the Kellastone Company were transferred to plaintiff in error was in writing and was as follows:

> "Articles of agreement entered into at Chicago, Illinois, this second day of September, A. D., 1913, between United States Kellastone Company, an Oklahoma corporation, hereinafter designated as first party, and Mercantile Trust Company of Illi-

nois, an Illinois corporation, hereinafter designated as second party.

"WITNESSETH, that whereas first party is desirous of selling to second party contracts, accounts receivable and choses in action, hereinafter designated as accounts, evidencing shipments of personal property, now, therefore in consideration of the premises the parties agree as follows:

"*First*—Second party agrees to buy the accounts belonging to first party which are acceptable to it, and to pay therefor ninety-nine per cent of the face value thereof on accounts that are paid within fifteen days from date of purchase by second party, and ninety-eight per cent of the face value thereof on accounts that are paid within thirty days from date of purchase by second party, and for each thirty days thereafter that said accounts are not paid the purchase price shall be reduced one per cent. Payment to be made by second party as follows: Seventy-seven per cent of the face value thereof upon acceptance by second party, the remainder, less all deductions, to be paid to first party immediately upon payment of any such accounts to second party; provided, however, that if at the time of any settlement between the parties hereto any of the accounts purchased hereunder shall be in default, payment of such remainder while any of the accounts are in default shall be discretionary with second party.

"*Second*—The term 'default' or 'loss,' as used in this contract, is construed to mean the non-payment of an account to second party at maturity, insolvency of the debtor, failure or refusal of a debtor to accept, receive or retain the property evidenced by such account. First party agrees to pay to second party all expenses, attorney's fees and losses incurred by second party in and about any account in default.

"*Third*—It is agreed that contemporaneously with the purchase of accounts first party shall assign and set over to the second party such accounts purchased by it, to the end that second party shall be and become subrogated to all of the rights possessed by first party in respect thereto. Second party shall have the right to endorse the name of first party on all evidences of shipment or payment pertaining to accounts purchased hereunder. First party shall make entries upon its books disclosing the sale to second party of accounts purchased hereunder, and all records pertaining thereto shall at all times be open to the inspection of the second party.

"*Fourth*—It is expressly understood that the purchase of accounts by the second party is made upon representations in writing concerning the financial responsibility of the first party, statements of which are to be furnished the second party once every calendar year.

"*Fifth*—First party is hereby given the right to make collections of accounts purchased by second party, and to that extent first party shall act as the agent of the second party. The agency hereby created may be terminated by either party upon written notice. During this agency first party agrees to transmit and deliver to second party at its offices in Chicago, Illinois, on the day of receipt thereof, all evidences of payment of accounts purchased hereunder, in the original form received.

"*Sixth*—This agreement and all its provisions shall inure to and become binding upon the heirs, executors, administrators, successors and assigns of the parties hereto.

"In witness whereof the parties hereto have caused these presents to be executed on the day and year first above written.

UNITED STATES KELLASTONE COMPANY,

(Seal)

(Seal) By Aaron Bodenweiser, Pres. (Seal)

Attest: J. G. McConnell, Asst. Sec.

(Seal) MERCANTILE TRUST COMPANY OF ILLINOIS,

By A. D. Nast, Pres.

Attest: R. W. Pearson, Sec.

On the back of this agreement was the following guaranty signed by defendant in error and two other persons who were stockholders in the Kellastone Company:

"The following guaranty and waiver is to be signed by individuals:

"In consideration of the sum of one ($1.00) dollar and other valuable consideration paid by Mercantile Trust Company of Illinois to each of the undersigned, receipt of which is hereby acknowledged, they and each of them do hereby jointly and severally guarantee to Mercantile Trust Company of Illinois, its successors or assigns, the full, prompt and faithful payment, performance and discharge by United States Kellastone Company of each of the provisions and conditions of the agreement on reverse side hereof, or any other instrument given or executed in pursuance thereof.

"The undersigned hereby jointly and severally waive all notice of default by first party, and waive notice of acceptance of this guaranty by Mercantile Trust Company of Illinois, its successors or assigns.

"In witness whereof we have hereunto set our hands and seals this second day of September, A. D. 1913.

AARON BODENWEISER, (Seal)
J. G. MCCONNELL, (Seal)
E. H. KASTOR, (Seal)

We do not understand it to be disputed that a sale may be lawfully made of a chose in action and its payment at maturity by the debtor guaranteed by the seller, but the contention is that the transaction here involved was a loan and not a sale. In determining that question resort will first be made to the written agreement to ascertain the intention of the parties, but courts will not be confined to the instrument itself in arriving at that intention. Extraneous evidence may be heard of facts and circumstances tending to throw light upon the question whether the transaction was understood and intended as a sale or whether it was intended and understood by both parties to be a loan. The following principles appear well settled by authority: (1) That construction should be given a written agreement which will best effectuate the intention of the parties, to be collected from the whole instrument; (2) where a contract is susceptible of two constructions, one of which would render it valid, the other invalid, preference is given the construction that would render it valid, (*Clemens* vs. *Crane*, 234 Ill. 215; *Peckham* vs. *Haddock*, 36id. 38; *Minnesota Lumber Co.* vs. *Coal Co.* 160id. 85; *Hobbs* vs. *McLean*, 117 U. S. 567; *Lorillard* vs. *Clyde*, 86 N. Y. 386, Anson on Contracts—2d Am. ed.—sec. 252.) Where the language of the written instrument is plain and unequivocal and there is no room for construction, the instrument will be given its legal effect as written, even though the parties may have failed to express their real intention. (*Clark* vs. *Mallory*, 185 Ill. 227.) That a contract, on its face, is one of sale, in cases of this

character is not conclusive. If it was the intention of the parties to it that it was a contract for a loan, extraneous evidence will be heard to show what the true intention was, and if it clearly appears the intention of both parties was that it was a loan, it will be construed in accordance with the intention of the parties, but where, on its face, the contract is *prima facie* one of sale, the presumption will be indulged that the intention of the parties was expressed in the instrument, and it will be construed accordingly, unless it is clearly shown by extraneous testimony that notwithstanding the contract is in form one of sale, the intention of both parties to it was that it was a contract for and to secure a loan. The trial court construed the agreement between plaintiff in error and the Kellastone Company to be a contract of sale and not a pledge or loan and a contract of sale. The Appellate Court construed it to be a pledge or loan and not a contract of sale. In our opinion the intention of the parties must be ascertained from the instrument itself.

Defendant in error contends that the written instruments by which the accounts were assigned to plaintiff in error by the Kellastone Company, called certificates of indebtedness, throws some light on the intention of the parties. These written instruments were not signed by defendant in error. They gave a list of the names and addresses of the Kellastone Company's debtors, the amount of the account against each and when due, and the Kellastone Company certified that the persons named were indebted for merchandise sold and deliv-

ered, in the sum set opposite their names. The "certificates of indebtedness," following the inventory of the accounts, state, in substance, that in consideration of one dollar and other good and valuable considerations the Kellastone Company sells, assigns and transfers to the Trust Company all its right, title and interest in the accounts named, together with the merchandise represented thereby, including the right of stoppage *in transitu*. The Kellastone Company guaranteed the correctness of the accounts, that deliveries have been made on all of them in accordance with the specifications of the buyer; that there are no contra-accounts against them; that there are no offsets against any of them for freight, drayage or other carrying charges, commissions, damage or any other counter-claim; that the amount set out is net and payment not contingent, and that entries have been made on the books of the Kellastone Company showing the sale to the Trust Company. The Kellastone Company agrees to advise the Trust Company of any occurrence that may impair or reduce the amount due on any account and submit the original correspondence relating to any account when requested. In consideration of the premises the Kellastone Company guarantees the full payment to the Trust Company of the accounts.

The certificates of indebtedness were merely the written assignemnts of the accounts by the Kellastone Company, and even if, as contended by defendant in error, that company assumed a greater liability in the assignment than it did in the original agreement, we are unable

to see that it in any way indicates a different intention from that appearing from the language used in the original agreement guaranteed by defendant in error, nor do we think it can be said that much importance can be attached to the proof that before the original agreement between the parties was made the Kellastone Company was financially embarrassed and had requested a loan from the plaintiff in error. We are convinced, from a consideration of the record, that the intention of the parties, whether the transaction was a sale or a loan, must be determined, alone, from an inspection of the language used in the agreement itself.

Both parties cite from Federal cases, principally *In re American Fibre-Reed Co.* 206 Fed. Rep. 309 (affirmed by the Circuit Court of Appeals under the title of *HOME BOND CO.* vs. *McCHESNEY,* 210 Fed. Rep. 893), cited by the defendant in error, and *CHASE & BAKER CO.* vs. *NATIONAL TRUST & CREDIT CO.,* 215 Fed. Rep. 633, (decided by the District Court), cited by plaintiff in error, in which cases contracts similar, in some respects at least, to the one here involved were construed. In the decisions cited by defendant in error the contracts were held to be loans, and in the cases cited by plaintiff in error the written instruments were held to be sales. None of the cases cited by either side are sufficiently in point or controlling as to govern the decision in this case. There is no conflict in the decisions as to the general contract principles governing the construction of such instruments. Where contracts have been construed to be loans, it was found, either from the

instrument itself or from extraneous facts as to the transaction between the parties that it was intended as a loan, and where contracts have been sustained as a sale it was because it appeared from the written instrument that the transaction was intended to be a sale and proof of extraneous facts did not show a different intention. In our view of this case there is nothing in this record of aid to us in arriving at the intention of the parties outside of the written instrument itself. Summarizing it in substance, (1) the agreement recited that the Kellastone Company is desirous of selling to the Trust Company accounts receivable evidencing shipments of personal property. The Trust Company agrees to buy such as are acceptable to it and pay ninety-nine per cent. of the face value of accounts paid within fifteen days from the date they are purchased, ninety-eight per cent. for those paid within thirty days from their purchase, and for each thirty days thereafter that said accounts are not paid the purchase price to be reduced one per cent. Seventy-seven per cent. of the face value was to be paid in cash at the time of the purchase, and the remainder, less deductions, immediately upon payment of the accounts to the Trust Company, provided that if at the time of settlement between the parties any accounts were in default, payment of the remainder of the purchase price should be discretionary with the Trust Company; (2) Default or loss should be construed to mean (a) non-payment of an account to the Trust Company at maturity, (b) insolvency of the debtor, (c) failure or refusal of a debtor to receive and retain prop-

erty evidenced by the account, and the Kellastone Company agreed to pay the Trust Company all expenses, attorney's fees and losses incurred by the Trust Company in and about any account in default. (3) Contemporaneously with the purchase of accounts the Kellastone Company was to assign to the Trust Company the accounts purchased and make entries on its books showing the sale. (4) It was expressly understood that the purchase of accounts by the Trust Company was made upon representations in writing concerning the financial responsibility of the Kellastone Company. (5) The Kellastone Company was given the right to make collections of accounts sold the Trust Company, acting as its agent, such agency terminable by either party on written notice, and collections made while the agency existed were to be turned over to the Trust Company by the Kellastone Company the day received, in the original form received.

Defendant in error devotes many pages of his brief and argument in an effort to show that the contract, on its face, is a loan and not a sale. We shall not undertake to review all of the points made in the argument upon that question, but will only mention those upon which we understood the greatest reliance is placed.

It is contended the Kellastone Company retained interest—or, as it is called in the argument, "an equity"—in the accounts to the extent of the difference between the purchase price paid in cash and the amount to be paid upon the collection of the accounts in full, and that the provision of the agreement that if at the time

of any settlement between the parties, any accounts purchased should be discretionary with plaintiff in error, shows that the accounts were intended to be pledged for security. As we construe the instrument, the Kellastone Company retained no interest in the accounts, equitable or otherwise. By the terms of the agreement the entire account was to become the property of plaintiff in error upon the payment of the amount agreed to be paid in cash. The provision that the balance of the purchase price should not be due until the account was collected did not leave any interest in the account or its proceeds in the Kellastone Company, but simply gave it a right of action against plaintiff in error to recover the balance of the purchase price when due under the terms of the sale. The fact that the profit, or the amount received by plaintiff in error, would be usurious if the transaction was a loan could not affect its validity nor change its character if it was, in truth, a sale. An owner may sell his property for such price and on such terms as he chooses.

Some of the other grounds upon which it is insisted the transaction was a loan are, that the price to be paid is not definitely fixed, the agreement that the Kellastone Company should pay all expenses, attorney's fees and losses incurred by plaintiff in error, the provision requiring information of the financial standing of the Kellastone Company, authority to the Kellastone Company to make collections, and the requirement that entries be made by the Kellastone Company upon its books of the sale of accounts. These provisions, it is

argued, show that the transaction was not a sale of the accounts, but was a pledge to secure a loan. We have given the argument of defendant in error and the authorities cited by him our consideration, but in our opinion there is not a provision or condition in the written instrument which is not (?) a provision inconsistent with a sale. The transaction purports in its face, to be a sale which was lawful, and under the authorities above cited the presumption is that it was a sale, unless that presumption was clearly overcome by proof showing that it was the intention of both parties that it was a loan. In *Eames* vs. *Hardin,* 111 Ill. 634, which is an instructive case upon the subject here under discussion, it was held the doctrine is well established by the authorities that one person may purchase property of another and agree to convey it back upon payment of a stipulated price, and the transaction will be sustained as a re-sale if it was in good faith and was not resorted to for the purpose of evading usury laws.

We are referred to cases (*Miller* vs. *Bates,* 35 Ala. 580, *Bright* vs. *Wagle,* 3 Dana, 252, and *Robinson* vs. *Farrelly,* 16 Ala. 472), where transactions purporting to be sales have been held to be loans, and that the form given them by the parties was intended as a shift or device to avoid the usury laws, but such construction either resulted from the language of the agreement itself or from that and extraneous facts, proved, and in our view those cases are not controlling here.

Defendant in error claims the Kellastone Company was a guarantor of the payment of the accounts, and he

was a guarantor liable in such case. Defendant in error guaranteed the Kellastone Company would perform its agreement and fulfill its obligations, or that if it did not, he would. We are unable to see any reason, in law or logic, why defendant in error cannot be held liable on his contract of guaranty. The same kind of a contract of guaranty was before the court in *Rapelya* vs. *Anderson*, 4 Mill, 472, and the guarantor was held liable. But in the absence of any direct authority, we think, under the rules of law defining a guaranty and the liability of the guarantor, it must be held the contract of guaranty of defendant in error is valid.

Defendant in error contends that conceding the contract to be one of sale, plaintiff in error cannot maintain its action because the certificates of indebtedness evidencing the accounts sued on show, by indorsement on their face, that they have previously been assigned or transferred by plaintiff in error to third party. We do not think defendant in error in a position to here raise that question, as it does not appear to have been urged in the trial court, hence no action of the trial court with reference to this question is before us for review. (*Smith* vs. *Moore*, 3 Scam, 462; *Kunkel* vs. *Consolidated Traction Co.* 156 Ill. App. 393; *Dunbar* vs. *Springer*, 256 Ill. 53.) Again, the payee or assignee of a written instrument in possession is presumed to be the owner though on the face of the instrument appears an assignment from the party in possession. *Brinkley* vs. *Going*, Breese, 288; *Porter* vs. *Cushman*, 19 Ill. 572; *Pardee* vs. *Lindley*, 31 id. 174.

We find no reversible error in the instructions of the court to the jury, and while other questions are raised and discussed in the briefs, in the view we have taken of the case, it is unnecessary to refer to or discuss them.

The judgment of the Appellate Court is reversed and the judgment of the municipal court is affirmed.

Judgment reversed.

The court will note that the Mercantile Trust Co. "was authorized by its charter, among other things, to buy, sell, hold and own open accounts and choses in action of every kind, but its charter did not authorize it to engage in the business of loaning money."

Exactly the same powers and authority were vested in the appellant—The Home Bond Company—and it nowhere appears that it had any other power. (See Intervening Petition, record page 5.) The contract under consideration in the Kastor case is so like that between the appellant and the two bankrupt companies as to create an impression that they may have been the product of the same mind. Even the guaranties (page 10 of record) given in each case are practically identical.

Respectfully submitted,

S. M. SAPINSKY,
Attorney for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 90.

HOME BOND COMPANY (INTERVENOR BELOW), - *Appellant,*

versus

H. V. MCCHESNEY, TRUSTEE, ETC. (DEFENDANT BELOW), - - - - - - - - - *Appellee.*

SUPPLEMENTAL BRIEF FOR APPELLEE.

May it please the Court:

Since the brief for appellee was filed herein, the case of *In re* Grand Union Company, decided by the Circuit Court of Appeals for the Second Circuit, has been reported. It may be found in 219 Fed. 353.

There has been cited in the supplemental brief for appellant, filed herein, the case of Mercantile Trust Company of Illinois v. E. H. Kastor, which case was decided October 27, 1915, the opinion in which has not yet been published. In order to carry out our original design of calling to the attention of this court all cases involving contracts similar to the one in the case at bar, and also to comment on the case above referred to as cited in the supplemental brief for the appellant, we desire to file this supplemental brief for the appellee.

In the case of *In re* Grand Union Company, 219 Fed. 353, there is involved a contract to buy and sell piano leases (that is, bills of sale of pianos, the purchase price therefor being paid in installments). The contract on its face purported to be one of purchase and sale, and its language bore less evidence of the contract being other than it purported to be than the language of the contract in the case at bar, and yet, in that case the court reached the conclusion that the contract itself, as well as the transactions carried on thereunder, showed it to be one of lending and borrowing, and not of purchase and sale.

The court in its opinion, says:

> "A sale is a transfer of property in the thing for a price in money. A transfer of property in the thing sold from a buyer to a seller for a price is the essence of the transaction. And the transfer is a transfer of the general or absolute property as distinguished from the special property.
>
> "A loan of money is a contract by which one delivers a sum of money to another and the latter agrees to return at a future date a sum equivalent to that which he borrows."

It says that the court will be governed by the nature of the contract itself, and the actions of the parties thereunder, rather than by what the parties have styled the contract, in determining whether it is one of sale or lending.

It also recognizes the principle that before a contract fair on its face, will be held to be usurious, or otherwise illegal, the evidence must be clear and convincing.

It states that the case before it is in some respects similar to the case at bar in the District Court, where it is reported under the style, *In re* American Fibre Reed Co., 206 Federal 309, and discusses this case at some length, indicating some of its salient points upon which the conclusions of the District Judge and the Circuit Court of Appeals were based. It also points out an important difference between the two cases, showing that the case at bar is more clearly one of lending than the case before that court was. That difference is that in the case at bar, there is no sale because the absolute property in the accounts were not transferred to the so-called vendee. Discussing this difference between the two cases, the court says:

> "It (the absolute property) was not transferred, because the vendee or purchaser only acquired the right to have or take from the proceeds of the accounts, the amount it had advanced thereon, and its stipulated usurious interest, and the remainder of the proceeds represented the interest in the accounts which the vendors had at all times retained, and which was to go for them, or for their benefit. To that extent the vendors had retained a property right in the accounts sold, and the court held that this prevented there being an absolute sale, and it construed the transaction to have been a loan at a usurious rate. But in the case at bar, the proceeds belonged to the vendee and the vendors retained no right in any part thereof."

Notwithstanding this important difference, the court in that case reached the conclusion that the contract there was not one of sale, but of loan, and that the leases were turned over as security.

Some of the points of similarity between that case and this are: (1) The alleged vendor collected all money due on the leases and accounts through one of its employes designated as attorney in fact, and he was paid by it, and not by the vendee. (2) Upon default in payment of any lease, or account, the vendor paid it to the vendee, or substituted another for it. (3) The vendor is made responsible for every conceivable loss. (4) The vendee never looked to the persons obligated by the leases or accounts for the money due it, but looked to the vendor, and to it only. (5) No notice of the assignment of the claims to the vendee was given to the persons owing them.

The court says that the fact that the vendor guaranteed the payment of the leases, does not, standing alone, convert the transaction from a sale into a loan, but that it is, however, a circumstance to be taken into consideration, in arriving at the true intent of the parties.

The decision of the court in that case strongly supports our position here.

A petition for writ of *certiorari* in that case under the style of Hamilton Investment Co. v. Ernst, Trustee, was denied by this court April 26, 1915, U. S. Adv. Ops. 1914, p. 664, and an appeal in this court under the same style was dismissed by stipulation June 1, 1915, U. S. Adv. Ops. 1914, p. 938.

The opinion of the Supreme Court of Illinois, in the case of Mercantile Trust Co. v. Kastor, above referred to, is of course, not controlling in this case involving a contract, whether made in Kentucky or Indiana. That opinion is nothing more than advisory, so far as this

court is concerned. A different conclusion from that reached by the Illinois Supreme Court, was reached by the Illinois Appellate Court, in that same case, that opinion being reported in 191 Ill. App. 219. The reasoning of the Appellate Court seems to us to be as persuasive as that of the Supreme Court. Inasmuch, however, as the Supreme Court reversed the Appellate Court, and the appellant here is insisting that that case is very similar to the case at bar, we desire to call the court's attention to some very important distinctions between that case and the case at bar, viz.:

(1) That charter of the Mercantile Trust Co. did not authorize it to lend money, and under the Illinois Statutes, it seems that corporations, except banks, are prohibited from lending money. The appellant's charter, as we have stated in our former brief, is broad enough to authorize it to engage in lending money, under the power given it to "carry on business as a natural person."

(2) Under the law of Illinois, usury results in a forfeiture of all interest, while no such result follows either in Indiana or Kentucky.

(3) In the contract in the Mercantile Trust Co. case, there is no provision for an additional service charge where the account is not collected at maturity, or for a deduction from the service charge where it is paid before maturity, nor is there proof or admission that the extra service charge on accounts not paid at maturity should be at the rate of 1/30 of 1% for each day the account ran over; all of which appears to have been the case

under the contract, agreed facts, and pleadings of the appellant, in the case at bar.

(4) The guaranties of payment of the accounts in the two contracts are entirely different, both in form and substance. There is no provision in the Mercantile Trust Co. contract which requires the Kellastone Company (the seller in that case) to repurchase the accounts, if not paid at maturity, at the amount paid by the purchaser plus the discount provided for in the contract, as is provided in the contract in the case at bar. Where a chose in action is "sold" under a contract which requires the vendor to "repurchase" at the "sale" price plus usurious interest, then such a "sale" is nothing but a money-lending transaction. "Repurchase" under such circumstances is nothing more than repayment, with the redemption of the surety.

(5) Near the end of the third clause of the contract in the case at bar (Record, p. 8) it is provided that if the merchandise represented by the accounts should be refused or returned for any cause, the title to such merchandise should be and remain in appellant until such accounts were paid. This could not mean until the accounts were paid by the customers of the bankrupts, for if the goods were returned, those customers of course would never pay. It means simply that the title to such merchandise shall remain in appellant until the bankrupt shall pay to appellant the amount due under the contract, to-wit: the 75% advanced, together with the service charge, and the pledge be thus redeemed. If we were dealing with this feature of the contract alone,

there surely could be no contention but that the passing of the title to such merchandise to the appellant was only as security for the amount to be paid by the bankrupt. It surely could not be contended that by such a provision, this merchandise was sold outright to the appellant. This being true so far as this feature of the contract is concerned, we think it follows as a matter of course, that the accounts which represented the merchandise were also held as security merely. It was evidently the purpose of that provision simply to substitute the merchandise for the accounts as security. There is no such provision in the contract in the Mercantile Trust Co. case.

(6) That contract requires the Kellastone Company, (vendor) to remit to the Mercantile Trust Company collections in the original form in which they were made. This was not done in the course of dealings between the parties in the case at bar. The proceeds of the collections merely were remitted.

(7) The provisions as to payment of expenses and attorneys' fees incurred in collecting accounts by the vendee or lender, are different in the two contracts.

(8) The opinion of the Illinois Supreme Court itself states that the case at bar is not sufficiently in point for the opinions rendered by the lower courts herein to be controlling in that case.

(9) That court states that there is nothing in the record in that case, outside of the contract itself to aid it in arriving at the intention of the parties. Here we have the agreed statement of facts, as well as the admissions

in appellant's pleadings, which lend material aid in arriving at such intention.

(10) That court holds that the vendor in that case had no property right, or equity, left in the accounts sold, but that the entire property passed to the Mercantile Trust Company. It will be observed, in reading cases which have dealt with contracts similar to this, that considerable stress is laid upon whether the alleged vendor reserved a property right or equity in the accounts transferred under the contract, and as some of the cases that question seems to have been shrouded in doubt. Here, however, it seems to us that the question is relieved of all uncertainty. It has been discussed at some length in our brief heretofore filed herein. We now want to call the court's attention to the construction put upon this contract, so far as this question is concerned, by the appellant itself in its pleadings and in the agreed statement of facts. In its amended petition filed (Record p. 16) it is stated by appellant:

> "That under the contract of sale between this claimant and the said Chair Company, *there would be an equity in said accounts to said Chair Company of twenty per cent thereof.*"

Substantially the same statement is made in the same pleading in reference to the contract with the other bankrupt (Record p. 19). It is also stipulated in the agreed statement of facts (Record pp. 41 and 42) that the bankrupt, *to whom the account was due,* would collect it

through the attorney in fact; the entire collection would be remitted to appellant; it would retain the 75% paid on the account, and its service charge, and the remit back to the bankrupt *the balance of the proceeds of its collection.* In the contract itself, (fourth clause) this balance of the proceeds is the money referred to as "belonging to said first party," that is, to the bankrupt.

These allegations in appellant's pleading, and the stipulations of the agreed statement of facts, and the wording of the contract itself, are hardly in keeping with the statement in appellant's brief (pp. 27, 43) to the effect that this twenty per cent belonged absolutely to the appellant, and in no sense to the bankrupt; that it was but a reserve part of the purchase price not paid at the time of the purchase of the accounts.

The same pleading of appellant (Record p. 16) also refers to the "service charge" as being the "profit to claimant in said matter," and on page 17, as representing "its charge for buying said accounts, and its compensation for its services in that regard." Here is a most extraordinary situation, for the one who claims to be the owner of assigned accounts says that the difference between the face amount of the accounts and the purchase price, that is, the amount of the discount, is a "service charge," and that such service charge is for compensation for its services rendered in buying the accounts. There is not a suggestion anywhere in this record that any services were rendered by appellant excepting this one stated in its pleadings, which is the service of buying

accounts. That pleading also states that the items appearing as "extra service" consisted of a charge of 1/30 of 1% for each day the account ran over the time stipulated in the contract." This putting of extra service upon a day basis shows the analogy to an interest transaction.

The foregoing distinctions seem to us to show that the case of the Mercantile Trust Company v. Kastor, is not in point here, even if the opinion were controlling authority in this court.

If the business of apepllant is to be judged by its transactions with the bankrupts, then it deals in nothing but money. Its transactions amount to nothing more or less than the lending of money. It did nothing for the bankrupts, except to advance money for their benefit, and the bankrupts received nothing from it, except the use of the money which it advanced, and which money the bankrupts obligated themselves, with surety, to repay. Interest is money paid for the use of money. That, in a usurious form is what the appellant was getting, and was all to which it was entitled.

Where we have a transaction in which one party is to do nothing except to advance money, and then to receive back that money, together with a discount, or "service charge" or interest, or whatever the accretion may be called, and to all of which it is entitled at all events; and where the other party does nothing except to receive the money and then repay it, together with such accretion, the amount thereof depending solely upon the time which elapses between the date of the receipt

and the date of the repayment, it is hard for us to conceive how the transaction can be other than one of lending and borrowing.

Respectfully submitted,

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LEWIS A. NUCKOLS,
Attorneys for Appellee.

ELI H. BROWN, JR.,
BROWN & NUCKOLS,
Of Counsel.

Supreme Court,
FILED
APR 19 1915
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES

No. 393

OCTOBER TERM, 1914.

HOME BOND COMPANY (Intervener Below), - - - - - - - - - Appellant,

versus

H. V. McCHESNEY, TRUSTEE, ETC. (Defendant Below), - - - - - Appellee.

BRIEF FOR APPELLEE.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 392.

HOME BOND COMPANY (INTERVENER BELOW), - *Appellant,*

vs.

BRIEF FOR APPELLEE.

H. V. MCCHESNEY, TRUSTEE, ETC. (DEFENDANT BELOW), - - - - - - - - - - *Appellee.*

STATEMENT OF CASE.

May it please the Court:

The nature of this suit, the respective contentions of the parties, and the questions involved in this appeal, are correctly stated in the brief for appellant, heretofore filed herein. We expect, however, in presenting the argument for appellee to refer more particularly to some of the facts in the case, to illustrate the propositions advanced by us.

Your Honors will have seen, from the statement of the case in appellant's brief, that the main question here is, whether the contracts between the appellant, and the bankrupts, The New England Chair Company, and the American Fibre Reed Company, and the transactions between the parties thereto in carrying out those contracts, constituted a sale of the accounts, accounts re-

ceivable of those two companies to appellant and a purchase by it of those accounts (as claimed by appellant) or a lending of money by appellant to the companies, and a borrowing by them from it, upon the security or pledge of those accounts (as claimed by appellee). The question is not so much whether there was usury exacted by appellant in its dealings with the bankrupts, but whether there was a purchase and sale, or a lending and borrowing. If the transactions amounted to a lending and borrowing, then the usury is not an open question, for under the 10th item of the Agreed Facts (page 43, Record), the amounts exacted or retained by appellant as a discount or a "service charge" are equal to an interest charge of 24% per annum, on the money loaned by appellant on the respective accounts, from the time of such lending to the time of repayment to appellant. In other words, it is admitted by appellant that if these contracts constituted a lending of money by it to the respective companies, then the interest which it charged and collected on its loans was at the rate of 24% per annum. It makes no difference whether the contracts are to be considered as Kentucky contracts, or as Indiana contracts; the legal rate of interest in both States is 6% per annum, and a charge of a greater rate of interest is void as to the excess over the legal rate. Under the statutes of both States, usury which has been paid may be recovered, or recouped. The statutes of both States involved are set out at length, in the brief for appellant, at pages 9 and 10.

ARGUMENT.

The contentions advanced in the appellant's brief, in support of its position, are the same which were urged before the Special Master, the District Court, and the Circuit Court of Appeals; all of which tribunals rejected those contentions, in toto, and found for appellee. Those contentions have been so fully and completely answered by the opinions of the Special Master, the Honorable D. W. Lindsey (Record, page 45), the District Judge, the Honorable A. M. J. Cochran (Reord, page 59), and of the Circuit Court of Appeals for the Sixth Circuit (Record, page 75), that we feel it will be hard indeed for us to say anything that will add to the strength of those opinions, or to give any answer to appellant's contention, better than that contained in those opinions themselves.

Judging from arguments made, and authorities cited in the brief for appellant, it would seem that its attorneys do not yet understand just what the appellee's position is upon some of the propositions advanced in their brief. It may therefore simplify matters somewhat for us to state here that:

(1) In the first place, we do not contend, and have never contended, that the burden was not on the appellee to show that these contracts between appellant and bankrupts, and the transactions as carried out by the parties thereto thereunder constituted a lending of money at usurious interest upon the security, of the accounts receivable, and not a sale of the accounts outright. We have always admitted that that burden was on him, and

it is therefore unnecessary for appellant to encumber its brief with authority to that effect. In this case, there is no dispute of fact; the contracts are admitted, and all other facts agreed upon. The sole question, then, is whether, upon the record, the appellee has sustained that burden.

(2) We have never contended, nor did the Special Master, or the District Court, or the Circuit Court of Appeals, conclude (as erroneously supposed by appellant) that because the bankrupts guaranteed the collection of accounts that fact alone constituted the transaction a loan rather than a sale. That the appellant is in error in supposing the conclusion of the Special Master was based upon that fact is well pointed out by the District Judge in his opinion (Record, p. 59, at page 62-63) when he said:

> "The argument on behalf of the Bond Company assumes that the conclusion of the Special Master is based on the consideration that the bankrupt guaranteed the payment of the accounts, and is directed largely to combating the idea that *this* consideration rendered the transaction a loan, and not a purchase. Numerous cases are cited where purchases of notes and accounts accompanied by a guarantee of payment have been held to be purchases and not loans at usurious rates of interest. But I do not understand that the Special Master's conclusion is based on this consideration. Nor is it needed to uphold it. Possibly, however, the fact that the contracts were accompanied by a personal guarantee that the bankrupts would make full, prompt, and faithful payment and discharge of all the agreements and provisions therein contained to be kept, observed and per-

formed by it, is not without some significance in upholding that conclusion."

We do say, however, that the fact that such a guarantee was given—and especially in the form in which it was given—constitutes one of the elements going to show that these transactions were intended as loans and not as sales outright. This guarantee feature will be discussed more at length at another place.

With this statement as to what appellee does not contend for, we will proceed now to state the reasons upon which we do rely for an affirmance of this case by this Honorable Court.

DISCUSSION OF THE CONTRACT.

The contract shows, on its face, that it is one of lending and borrowing, and not one of sale outright.

(Inasmuch as the two contracts in question are similar in their provisions, we will refer to them as one contract.)

We say that the contract shows on its face that it is one of borrowing and lending, and not one of sale, for the following reasons:

(a) Because, under its terms, there are wanting two essentials necessary to constitute a sale, viz.: (1) there is no transfer of the absolute property in the accounts, as distinguished from a special property, and (2), no definite price is fixed as the purchase price. In Cyc., Vol. 35, p. 27, in discussing the distinguishing characteristics of a sale, it is said:

> "The essence of a sale is the transfer of the property in the thing from the seller to the buyer. The elements which distinguish a sale from other transfers are: (1) that the transfer is of the property; that is, of the general, or absolute property, as distinguished from a special property; and (2) that it is for a price."

Under the terms of this contract, the right to the balance of the proceeds of an account, when same should be collected, remaining after deducting the amount advanced upon it by appellant, together with the "service charge" or "discount" retained by appellant, after also deducting such credits, or offsets or discounts as may have been claimed by the customer, owing the account, always remained in the bankrupt. As is well said by the Circuit Court of Appeals (Record, p. 75):

> "The Special Master, and the District Judge, upon full consideration of the issue and evidence, concurred in the conclusion that the transactions had under the contracts were pledges, not sales of the accounts receivable. This conclusion is decisive of the issue concerning usury; and its rightfulness is the more apparent *because the record discloses to us a mutual intendment that the right at least to twenty per cent of the full value of each of the accounts receivable, was always to remain in the bankrupts, except only for the purposes of security; this right could not be both sold and owned by the bankrupts.* Such transactions are unlike those which in form are sales, and involve the taking over of promissory notes and the like, including accounts receivable, at a discount, *but with the right alike to the entire face value and proceeds.*"

These accounts, under the contract, were to be collected by the bankrupt, the alleged seller, at its own costs and expense. Appellant only acquired the right to take from the proceeds of the account the amount it had advanced thereon, with its stipulated service charge, and the remainder of the proceeds received from the collection of the account represented an interest, or property in the account, which the bankrupt retained. This interest of the bankrupts in the proceeds of the accounts is referred to at the close of the 4th clause of the contract as "*belonging to said first party,*" that is, to the bankrupts. These considerations show that there was never a transfer of the absolute, but only of a special, property, in the accounts to appellant.

Nor is any definite price fixed as the purchase price. The first cause of the contract (Record, p. 7) undertakes to fix the amount which shall be "paid" for the accounts. Under that clause, however, it would not be ascertained how much the bankrupt would receive for any account, until that account had been collected. While it is true that, under the second clause, the amount of the cash payment to be made was fixed, in that it depended upon the time within which the account matured, it is clear that, under the first clause, what the bankrupt was finally to receive for the accounts, would depend, not upon the date of maturity, but upon the date of the actual collection of the account, and also upon what set-offs, deductions, or discounts were retained or claimed by the customer of the bankrupt who owed the account.

(b) Because of the nature of the guarantee provided for in the fourth clause of the contract. The fourth clause of the contract reads as follows (Record, p. 8):

> "Said party of the first part (the bankrupt) hereby guarantees the payment to the second party (appellant) or its assigns, of all accounts purchased hereunder, according to the terms hereof."

Had this guarantee stopped at that point, it probably might not have been so clearly indicative of a loan, and this case would have been more in line with the cases cited in appellant's brief. That clause of the contract, however, continues as follows:

> "In the event of non-payment at maturity to the second party of any accounts purchased as aforesaid, or should the debtor become insolvent, said first party hereby covenants and agrees to repurchase said accounts within five days after receipt of written notice thereof, and *to pay therefor the same amount paid to the first party by the second party, plus the discount provided for in the first paragraph of this contract;* said second party is hereby given the right, without notice to the first party to credit any moneys coming into its possession, *belonging to said first party,* on its accounts."

The nature and effect of the "guarantee" referred to in the first part of clause four, of the contract, is thus defined and made plain in the latter part of that clause. It is simply an agreement on the part of the bankrupt, in case of the insolvency of a debtor, or a failure to pay his account at maturity, or as indicated in the last part of that clause, in *any* event, to pay back to appellant the

amount advanced on such an account, together with the discount, or service charge, or whatever it may be called —provided for in the contract. That such discount amounted to an average of at least 24% per annum on the money advanced, is admitted.

We see no way in which the provisions of this fourth clause can be distinguished from a right given the appellant to demand of the bankrupt the repayment of the amounts advanced on the accounts. This brings this case squarely within that class of cases referred to in 35 Cyc., pp. 39 and 40, where it is said:

> "If, however, there is a right reserved by the buyer to demand and enforce repayment, the transaction is not a sale; but in the nature of a mortgage."

The author cites, Robinson v. Farnelly, 16 Ala. 472, as holding:

> "When the vendee retains the right to demand repayment of the vendor, notwithstanding the purchase, it is conclusive to show that the transaction was intended as a surety and not a sale."

These textbook and case citations seem to us to be sound in principle. We note that appellant's attorneys say that the case of Robinson v. Farnelly has been overruled—in effect, not explicitly—by subsequent cases in that State. The distinction between that case and the cases cited by appellant as in effect overruling it, is however too obvious to need any comment. It is not the fact that a guarantee of the accounts was given, but it is the

nature of that guarantee, which we say brands this contract as one of lending.

(c) Because, under the contract, appellant was, in no event, ever to receive the face of the accounts. It was limited in its recovery to the amounts paid or advanced on the accounts plus the discount, or service charge; nor was it ever to receive any less than that. It was to be put to no expense to collect the money due it. This consideration alone, even if there were no other to support it, would seem to us to show conclusively that the contract was one of lending.

(d) Because of the bond required of the bankrupts, for the faithful performance of the contract.

At the foot of the contract (Record, p. 10), is a bond with sureties, required to be executed by the bankrupts, guaranteeing to appellant, the full, prompt, and faithful payment and discharge by the bankrupt, of all the agreements and provisions contained in the contract, to be by the bankrupt observed and performed.

When sifted down to its last analysis, the "faithful performance" of this contract by the bankrupt, consisted simply in returning to appellant the amounts advanced plus the service charge provided for in the contract, without loss or cost to it. To that, and to that alone, appellant was entitled. This bond then, was nothing other than surety for the repayment of money. It is the bond referred to by the District Judge, in that part of his opinion hereinbefore quoted, as being not without some significance in upholding the conclusion reached by the Special Master (Record, p. 63).

The case of Yankey v. Lockheart, 4 J. J. Mar. (Ky.) 276, is in point here. In that case, Lockheart, being the owner of a note against Hankley, amounting to $275.00, sold it to Yankey, for $200.00, and entered into an obligation with surety that, if Hankley did not pay the note, he, (Lockheart) would pay to Yankey the full amount of the note. Hankley not having paid the note, Yankey brought suit against Lockheart and his surety, for the full amount of the note. The court held that Yankey was limited in his recovery from his assignor to the amount paid for the note with legal interest. The court said:

> "Can Yankey, by a separate contract, independent of the assignment, enlarge Lockheart's legal responsibility, and thereby secure to himself more than the legal interest upon the money advanced? We are of the opinion that he can not. To tolerate it would tend to destroy the efficiency of the statute against usury, by encouraging shifts and contrivances to evade its statutory provisions. If Lockheart and Burton had unconditionally agreed to pay Yankey $275.00 on the 10th day of June, 1820, for the $200.00 advanced, it would have been a plain case of usury. Their agreement to pay it upon the condition that Hankley did not, can not alter the case in principle. It is only attaining by indirection that which can not be done directly. The law delights in doing things by a straightforward, open conduct, and sets its face against circuity and management."

So, in the case at bar, if the bankrupt had bound itself with surety, to pay back to appellant the amounts advanced, with interest at 24% per annum, it would be a plain case of usury. The fact that, under the wording

of this contract, it was required to make this payment under the guise of "repurchasing" uncollectable accounts, at the amount advanced upon them, plus the discount (that is, the usurious interest) can not alter the case in principle. And this especially when we remember that not only in the case of bad accounts, but in all instances, what appellant was entitled to receive was the amounts advanced, plus the usurious charge.

Continuing the quotation from the Yankey case:

> "There is nothing immoral or improper in a contract between assignor and assignee, to secure the latter against loss in consequence of the insolvency of the obligor and assignor both, but such contracts violate the statute against usury, where they attempt to impose a burden beyond the legal liability resulting from the assignment. For such excess there is no consideration; there is no risk on the part of him who lends the money. Yankey in the present case would make a usurious profit, without the danger of loss, were he permitted to recover the full amount stipulated to be paid him by the covenant."

The latter part of this quotation is peculiarly applicable to the case at bar.

(e) Because the bankrupt retained control of the accounts, with all the indicia of ownership. It was also required to bear all the expense and do all the labor of collecting the accounts. See the sixth clause of the contract (Record, p. 8).

(f) Because the undertaking of the bankrupt to repay to appellant the money advanced, with the discount, was direct and unconditional. The bankrupt alone was

resorted to for the payment and, with its sureties, was the only one to whom appellant looked for repayment. The advancements were made upon the responsibility of the bankrupt and its surety, and not of the various persons owing the accounts. The seventh clause of the contract (Record, p. 9) reads:

> "That said second party in making purchases of accounts hereunder relies upon the guarantee and covenants of said first party herein contained, and upon the written representations made to it by said first party as to the financial responsibility of said first party; that said written representations heretofore made and that hereafter may be made are for the purpose of establishing the credit of said first party with said second party so that sale of accounts may be made hereunder."

(g) Because, in the event appellant should see fit to attempt the collection of any of the accounts by suit, either in its name, or in the name of the bankrupt, then the bankrupt was required to immediately pay to appellant all court costs, expenses, attorneys' fees, stenographers' fees, which might be by it expended in such proceedings. See the eighth clause of the contract (Record, p. 9).

This provision is incompatible with the idea that there was a sale of the accounts outright. It would certainly be unusual, to say the least, to provide in a contract of sale that the seller should bear such expenses of collection of the accounts if the purchaser should, at any time after the sale, see fit to collect them by suit. Such a provision is not, however, an unusual one to be inserted in

a mortgage or hypothecation. In fact, the law itself attaches as an incident to an instrument of the latter kind the right to recover costs of suit, in addition to the debt, where the lien is enforced in a suit.

DISCUSSION OF THE AGREED FACTS.

For the seven foregoing reasons, we think the contract shows on its face that it is one of lending and not one of sale, and that it is not necessary to resort to the facts as to what transactions were had under the contract to show its true character.

The agreed facts as to how the parties thereto operated under the contract serves to reinforce that conclusion and, as we think, to remove all doubt as to the true character of the transactions. The nature of these operations is set forth in the second item of the Agreed Facts (Record, p. 41). Briefly stated, it is as follows:

From time to time the bankrupt would send to appellant, at its home office in Indianapolis, lists or statements, showing accounts due it, the bankrupt. Those lists showed the respective dates of the accounts, the addresses of the persons owing them, and the amounts of the respective accounts. Itemized statements of the accounts were sent with the lists. When these lists were received by appellant, it inspected them, and upon such accounts as were acceptable to it, it thereupon remitted to the bankrupt an amount equal to 75% of their face, all of the accounts being 120-day accounts. Such of the accounts upon which this 75% was paid were then stamped on the books of the bankrupt, to the effect that they had

been sold to the appellant. Thereafter, upon the maturity of these accounts, or whenever it was able to do so, appellant collected them, and turned over the proceeds to E. Manning, who was named in the contracts as the attorney in fact, as required by the contract. The proceeds so collected represented the face of the accounts less such discounts, or deductions, if any, as were claimed and made by the various persons owing them. Manning then remitted to appellant the proceeds so turned over to him. Appellant deducted from such proceeds the 75% of the face of the accounts which it had theretofore paid on them, together with its discount, or service charge, and returned the balance to the bankrupt. This service charge varied in amount. It was always figured upon the basis of a certain per cent of the *face of the account*, and that per cent depended entirely upon the time which had elapsed between the date it had paid the 75% of the face of the account, and the date the proceeds of the collection was returned to it, this percentage being regulated by the terms of the contract.

The E. Manning referred to above was an officer and bookkeeper of the bankrupt, employed and paid by it, and he received no additional compensation for services performed as such attorney-in-fact.

By the sixteenth item of the Agreed Facts (Record, p. 44) it appears that at no time between the making of the first contract (March 6, 1911) and the filing of bankruptcy proceedings (February 2, 1912) did the appellant ever collect, or undertake to collect, any of these accounts.

CONCLUSIONS AND AUTHORITIES SUPPORTING THEM.

It is therefore evident, from the contract, and from the transactions and conduct of the parties thereunder, that all that appellant was ever to receive from the proceeds of the collection of the accounts was the 75% of the face thereof advanced, or "paid" by it, plus the discount, or service charge. That the amount of this discount depended upon when the account upon which it was to be figured was collected, and that the amount thereof could not be ascertained until the account was collected, or until appellant saw fit to call upon the bankrupt to redeem the account; that is, to repay the amount advanced on it, plus the discount. That all deductions and discounts claimed by the persons owing the accounts were the loss of the bankrupt, and that the accounts were to be, and were, all collected by the bankrupt, through one of its own servants, employed and paid by it. That all of the burden of collecting accounts and looking after the details of the transactions with its customers, was borne by the bankrupt, and the bankrupt took all the risk of bad accounts. That appellant was to do, and did, nothing except pay to the bankrupt the amounts to be advanced on the accounts, and receive back its money so advanced, plus the discount, or service charge.

Appellant's attorneys speak of "onerous services" performed by it. All the service it ever rendered consisted merely in such bookkeeping as was necessary to keep the account straight between it, as the lender, and the

bankrupt, as the borrower, and a large part of that was done by the attorney-in-fact, employed and paid by the bankrupt.

Although it is true that itemized statements of the accounts were sent appellant, it is evident that the only purpose of doing so was either to enable appellant to satisfy itself as to the items included in the account, or to give color of sale to the transactions, as was also done by stamping them "sold" on the bankrupt's books. It evidently was not the purpose of so doing to vest appellant with any title or power of control over the accounts, or to take any such power from the bankrupt. This is shown by the fact that the bankrupt did continue to exercise all the rights of an owner of the accounts over them. These facts are incompatible with the idea that there had been any sale of the accounts, and also negative the idea that there had been any delivery to appellants, such as the law contemplates shall be had in the case of a sale.

It is insisted for appellant that before the question of usury can be considered by a court, it must affirmatively appear that the intention of the parties was that the transaction should be a loan, rather than a sale, and it is contended that this intention must be shown as a fact. That is, that it must be shown that the thought of the parties in making the contract was directed toward a loan. It is a maxim of the law of great antiquity, that "the thought of a man is not triable." Where the question is one of intention, that intention can only be arrived at by considering the statements and acts of the parties. So, we insist, in the case at bar, that while there

is no statement in so many words, that the parties had in contemplation, at the time the contracts were made, a loan, rather than a sale, yet, when the intentions of the parties are judged by their acts and contracts, it is clear that what they had in contemplation was a loan and not a sale. Of course, if the facts do not support us in this claim, the trustee has no standing in court.

As illustrative of the extent to which courts will go to hold that an instrument, purporting on its face to be a deed or bill of sale, is in effect a mortgage, or a pledge, and not a sale, especially where the transaction is tainted with usury, we call Your Honors' attention to the language of the courts in the following cases:

Bright v. Wagle, 3 Dana (Ky.), 252, at p. 254.
Emig v. Mutual Benefit Life Ins. Co., 106 S. W. (Ky.) 230, at p. 233.
Ringer v. Virgin Timber Co., 213 Fed. 1001, at p. 1008.
Edington v. Harper, 3 J. J. Mar. 354.

In Bright v. Wagle, *supra*, the Kentucky Court said:

> "Whenever it is shown by the proof in the cause, or by the confession of the defendant, in his answer, or by his evasive or general response to specific allegations in the bill, that the instrument of writing, though absolute on its face, or bearing the stamp of a conditional sale, was obtained by fraud, or mistake, or imposition on the grantor, or was *intended to cover an usurious transaction*, a court of chancery will not only hear such proof, but *will seize hold of it with avidity*, as a justification for giving the instrument the character of a mortgage or pledge, and allowing to the oppressed grantor the privilege of redemption." (Italics ours.)

In Emig v. Mutual Benefit Life Insurance Co., *supra*, the same court said:

> "Our laws against usury, and other devices and schemes resorted to by lenders to enable them to charge debtors more than the legal rate of interest, are rigidly enforced, and no plan, however ingenious, will be allowed to defeat them."

In Ringer v. Virgin Timber Company, *supra*, decided by the District Court for the Eastern District of Arkansas, April 8, 1914, Judge Trieber said, at page 1008:

> "But, regardless of the language used in the negotiations as descriptive of the transaction, if the transaction was in substance merely a device for the purpose of evading the usury laws, the plea must be sustained, for the law does not tolerate any device to avoid the consequences of unlawful acts. The authorities are unanimous that the courts will disregard the form which a contract may take, but look to the substance of the transaction in order to determine whether or not it is usurious. The books contain many cases where artful contrivances have been resorted to whereby the lender is to receive some other advantage, or something of value beyond the repayment of the loan with legal interest. In Missouri, Kansas, etc., Trust Co. v. Krunnseig, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474, a novel device had been resorted to for the purpose of evading the usury laws, but it did not prevent the court from sustaining the plea of usury. When that case was before the Circuit Court of Appeals for this circuit (77 Fed. 32, 23 C. C. A. 1), Judge Caldwell, who delivered the opinion of the court, quoted with approval from Trust Co. v. McLachlan, 59 Minn. 468, 61 N. W. 560, the following:
>
> "'We had supposed that in the course of our professional and judicial experience we had met with

about all the forms of contract which have been devised by the ingenuity of modern associations of this and similar kinds, but this one is entirely novel to us. It is certainly unique, and after a careful study of all its provisions, it seems clear to us that it must have been contrived for the purpose of evading either the insurance laws or usury laws, or both, of this State.'

"The finding of the Court of Appeals that the contract in that case was merely a device to obtain usurious interest on the loan was affirmed by the Supreme Court, 172 U. S. 351, 19 Sup. Ct. 179, 43 L. Ed. 474.

"Leading cases on that subject which have been followed by all the American courts are De Wolf v. Johnson, 10 Wheat. 367, 385, 6 L. Ed. 343, and United States Bank v. Owens, 2 Peters, 527, 537, 7 L. Ed. 508. In the first cited case the court held:

" 'Usury is a moral taint, wherever it exists, and no subterfuge shall be permitted to conceal it from the eye of the law. This is the substance of all the cases, and they only vary as they follow the detours through which they have had to pursue the money lender.'

"In the Owens case it was said:

" 'A profit made or loss imposed on the necessities of the borrower, whatever form, shape or disguise, it may assume, where the treaty is for a loan, *and the capital is to be returned at all events,* has always been adjudged to be so much profit taken upon a loan and to be a violation of those laws which limits the lender to a specific rate of interest.'

"The devices resorted to for the purpose of evading the usury laws are so manifold that it is impossible to enumerate them. New schemes are continually devised, but the courts will not permit them, no matter what disguise may be assumed, if in fact and effect it is but a device to obtain usurious interest."

Further, at page 1009:

> "That a *bona fide* sale of property will not be declared usurious is true, as the element of lending and borrowing is absent, but in every instance the courts add, 'unless it is a device to cover a loan and exact usurious interest.' "

This case is selected from the many which might be cited to the same effect, because of its clear statement of the law, and its citations of authorities, both from Federal and State courts. Also because of the fact that a concern known as The Illinois Realization Company was held to have entered into an agreement, which, though under the guise of a sale outright, was, in effect, a lending of money at a usurious rate, in the face of an express provision in its charter authorizing it to buy property, and *prohibiting it from lending money.* The appellant in the case at bar lays some stress upon the fact that its charter authorized it "especially to carry on the business of buying from others accounts and bills receivable due them." It is argued that because it was authorized to buy accounts, it could not, or would not, engage in lending money on them. It is to be observed, however, that it was also authorized "to carry on business as a natural person," and that authority is broad enough to cover lending money on accounts due others. The same argument made by appellee here was made in the Ringer case, but the court there properly, as we think, swept it aside. It held that no corporation would be allowed to exact usury and then defeat a plea of usury by

relying upon a provision in its charter which made a lending by it *ultra vires.*

In considering the question of usury the courts have always declined to lay down any fixed rules for determining whether a given transaction comes within the prohibition of the statute. The reason given for this is that if such rules should be established, it would become an easy matter for designing lenders to evade them. The courts have thus left themselves free to meet and overturn new schemes having that end in view, as they are devised. It follows that every case involving such a question stands more upon its own facts than it does upon the authority of cases that have gone before. For this reason it would be unprofitable to multiply citations in this brief, or to comment in detail upon the authorities cited for appellant. The distinction between those cases and the case at bar has been pointed out by the District Judge (Record, p. 63) and the Circuit Court of Appeals (Record, p. 76).

We understand the sum of the authorities to be that where there is a dispute or uncertainty as to the facts, the courts will be slow to hold that usury has been exacted, or was in contemplation; but where there is no dispute of fact, and it appears, or a clear preponderance of the evidence or the contract itself shows, that the transaction is tainted with usury, then it will be closely scrutinized, and no shift or device or scheme to evade the statute will be tolerated.

As stated in appellant's brief, the scheme here before the court is a new one, and for that reason cases that

have considered contracts in any degree similar to this one are rare. So far as we have been able to find there are, with the exception of the opinions of the lower courts in this case, but five such cases. They are:

In re Canfield, 193 Fed. 934 (113 C. C. A. 562).
Houghton v. Burden, 228 U. S. 161 (33 Sup. Ct. Rep. 235) 57 L. Ed. 780, affirming *In re* Canfield.
In re Fishel, 198 Fed. 464 (117 C. C. A. 224).
In re Messibovsky, 200 Fed. 562, 29 Am. Bank Repts. 235, and—
Chase & Baker v. National Trust & Credit Co., 215 Fed. 633.

The first of these cases, *In re* Canfield, decided by the Circuit Court of Appeals for the Second Circuit, and affirmed by this court in Houghton v. Burden, is claimed by appellant to be practically identical with the case at bar and conclusive of the question here involved in its favor. In view of this claim, we want to undertake to analyze that case somewhat at length. We believe it, when rightly considered, supports appellee's contention so far as it is applicable at all.

At the outset it should be borne in mind that in the Canfield case the contract was admittedly one of lending, and the only question was whether it was tainted with usury; while in the case at bar the only question is whether the contract is one of sale or of lending. If it is one of lending, then the usury stands admitted. It is evident, therefore, that there is wide difference between the questions involved in the two cases. Appellant's brief, at page 26, in speaking of the Canfield contract,

says, "Many of its provisions bear close resemblance to the provisions of the instant contract." That statement, we think, is correct. It is the "close resemblance" of this contract to a contract of lending, which w[illegible]ay shows it to be one of that kind. In making the comparison between the two contracts, as Your Honors are asked to do by appellant, we think you will reach the conclusion that this contract, like the Canfield contract, is one of lending, and not one of sale.

Appellant contends that because the Canfield contract contained a "guarantee" clause somewhat similar to clause fourth—the "guarantee" clause—of this contract, and because that contract was upheld by this court, therefore it follows that our contention in reference to that clause of this contract is wrong, and this contract is valid. In this appellant has again entirely misunderstood us. We do not claim that the guarantee clause makes the contract usurious or invalid. We do say that the fact that there is such a clause, with a guarantee of the kind therein contained, shows this contract to be one of lending, as the Canfield contract, with the similar provision, is. It is not the "guarantee" clause which makes the contract invalid; it is the exaction of illegal interest on a contract of lending that invalidates it.

Taking up now the facts of the Canfield case: Burden was a retired merchant in New York, possessed of some money, an expert accountant and desired to obtain some light employment. He advertised that he could lend from $10,000 to $20,000, at 6%, to a merchant whose rating was good if the loan would also secure such employment.

Through a broker negotiations were opened between him and Canfield, a merchant in business in New York, and Burden proposed to make the loan, provided he could get light employment in Canfield's office as financial man. Canfield's ratings, however, were not satisfactory to Burden, and for that, and because they could not agree on the work Burden was to do, negotiations between them were dropped. Sometime afterwards the broker reopened negotiations by suggesting that Canfield give Burden an indemnity bond by which the validity of the accounts which were to be assigned to cover the loan might be guaranteed, as well as the payment of collections made by Canfield. This proposed indemnity bond required the obligee, Burden, to do the following things, viz., to require Canfield to deliver a statement of the due dates of each assigned account, and if payment was not made within twenty days, to himself make demand upon the debtor for the amount due; to require a responsible employee of Canfield to certify that each account assigned represented a *bona fide* and actual shipment in pursuance thereof; to watch the shipping receipts and to make minute monthly examinations of Canfield's books, accounts and vouchers, and a comparison between all unpaid accounts on his own list and such accounts on Canfield's books. (See statement of the case in the opinion of this court, 228 U. S. at p. 106, and of the Circuit Court of Appeals, 193 Fed. 934.) Upon finding that in order to get the benefit of the indemnity bond, he would be required to do all these things, Burden demanded that he be allowed and paid a reasonable compensation for such

services, in addition to the interest on his money. This was agreed to by Canfield, and this clause was inserted in the contract:

> "The party of the second part (Burden) shall be entitled to compensation for the labor and services to be performed, and time to be expended, by him, in making the examinations required by the terms of the bond executed by the Fidelity & Casualty Company of New York, and delivered simultaneously herewith, which compensation is to be measured by computing 1% per month upon whatever part of the advance shall remain uncollected on the said accounts, and for the period that same shall remain uncollected."

Under that contract, some $14,000 of accounts were assigned to Burden, and he advanced some $10,000.00. Within less than one month, after the execution of the contract, bankruptcy proceedings were instituted against Canfield; and the question in the case was whether the 1% per month allowed Burden, under the contract, was intended as pay for services actually rendered, or to be rendered, or was but additional compensation for the use of his money, and therefore usury.

In that case the court permitted oral evidence as to the transactions between the parties to be heard. Canfield and his bookkeeper testified to certain statements of Burden, which made it appear that the so-called additional compensation was in reality usury exacted. These witnesses were flatly contradicted by Burden and the broker. The testimony as to this being evenly balanced, and the reasonable presumptions being against Canfield

and his bookkeeper, the court held that, under this state of proof, it could not be said that the oral testimony showed that Burden had been guilty of exacting usury, especially as the contract was valid on its face.

In that case the facts were in dispute, and the testimony on the two sides equally balanced. In the case at bar there is no dispute of fact, and no occasion for the court to weigh the testimony of one witness against another. In that case the taking of usury was a crime under the laws of New York, and for that reason possibly the courts of that State seem very reluctant to hold a contract to be usurious. Neither in Kentucky, nor in Indiana, is the usurer guilty of crime; nor is he even penalized for taking usury, as he is in some other States. He forfeits neither principal nor legal interest. He is merely deprived of the right to take or retain anything in excess of the legal rate. For this reason we find the Kentucky courts are careful to protect the borrower.

Most of the quotations in appellant's brief, from the opinions in the Canfield case, are remarks of the courts directed to, and commenting upon the reasonableness or unreasonableness of the testimony on the two sides, with a view to determining which was the more worthy of consideration. They therefore have no application here, there being no disputed facts. Having arrived at the conclusion that the oral testimony attacking that contract was not such as would be allowed to invalidate it, there was then no other question before the court, except whether the contract was valid on its face; and the court held that it was.

Appellant now contends that because the Canfield contract was held to be valid, on its face, this similar contract must also be valid. In view of this contention, it becomes important to consider just what it was in the Canfield contract that saved it from the taint of usury, and wherein that contract differs from the one here.

There was but one thing in the Canfield contract that kept it safe against the usury attack, and that was that, on its face, Burden was required to render actual, substantial service for the compensation allowed him, in addition to the legal interest on his money; that is, that such compensation was to be pay for labor to be performed, and not for money loaned. The opinions of both courts make this plain; it is upon that ground that they are based.

It is right in this provision that the two contracts differ most materially. Under the contract in the case at bar appellant was not required to do anything, or render any service, whatever—substantial or otherwise—for the compensation which it was to receive in addition to legal interest on the money advanced, and under the Agreed Facts, it did do nothing whatever.

While appellant might possibly have claimed the right to collect the assigned accounts, it was not *required* to do so in order to preserve any of its rights; and, as a matter of fact, during the eleven months intervening between the date of the first contract and the institution of the bankruptcy proceedings, never did do so. If the account was not paid at maturity, it had the right to call upon the bankrupt to pay to it, within five days, the

amount advanced upon that account, plus the usurious interest. While, under the fifth clause, the appellant had the right to audit the books and accounts of the bankrupt at any time it saw fit, it was not required to do so. The bond which it took from the bankrupt differed from the indemnity bond in the Canfield case, in that it did not require appellant to do anything whatever to entitle it to the full protection of the bond. It even waived notice of the acceptance of its guarantee by appellant. Appellant makes no claim that any of the money paid or to be paid it represented compensation for services.

So we say that when these two contracts are compared in the light of the opinions in the Canfield case, that case, so far as it is applicable at all, strongly supports appellee's contention.

In the Fishel case, *supra* (198 Fed. 464, Circuit Court of Appeals for the Second Circuit), the National Discount Co. was the assignee of certain specified accounts due Fishel, Nessler & Co., as collateral for repayment by them of advances made under an agreement, which agreement provided, among other things, in substance that the borrower should pay the lender a commission of 5% on the gross amount of the accounts to reimburse the lender for services rendered, or to be rendered, in the collection of the accounts, such as sending out statements, attending to all correspondence, adjusting returns, allowances, discounts and investigations, with reference to same, and for assisting in extending credits, securing references and reports, and generally aiding and assisting the customer with his credit department. There was, however,

before the execution of the agreement a letter written by the borrower to the lender, which stated in substance that in signing the formal agreement, it was agreed and understood that the lender should at no time have any communication whatever with any of the customers of the borrower, and that the accounts should only be used as collateral for loans made; that the borrower was to collect all accounts; and it agreed to endorse and turn over the checks to lender as received, and, if at the expiration of each loan, the full amount was not paid in that way, then the borrower was to send check to the lender to wipe out such a loan; and the proof showed that the lender was not intended to perform, and did not perform, any of the services mentioned in the agreement. It was held in that case, affirming the judgment of the District Court, that commissions agreed to be paid, in addition to legal interest, were a device to cover usury.

While the whole contract between the parties does not appear in the opinion of the Fishel case, it is evident to our minds that the contract in its intent and purposes was similar to the contract in the case at bar. The commission to be retained is the same in both cases. In the Fishel case the parties went through the useless formality of providing in the contract that the lender was to perform services for the additional compensation allowed it, and then stipulated, by letter, that nothing of the kind was to be done. In the case at bar the parties dispensed with this arrangement by omitting from the contract the requirement that appellant was to render any service for the "service charge" allowed it.

The only difference between the two contracts, so far as we see, is that in the case of the National Discount Co. contract the transaction was called a lending and borrowing by the parties to it, while in the case at bar it is styled a purchase and sale. We do not think it necessary to cite authorities to Your Honors to the effect that whether a transaction is a lending or selling is to be determined by the acts of the parties, rather than by the words they use. It appears from the agreed statement of facts in the case at bar that all the appellant did was to pay money to the bankrupt from time to time, on the strength of statements of accounts sent the former by the latter, and then to receive back from the bankrupt the amounts advanced on the accounts, with the discount, when collected by the bankrupt, and that the bankrupt performed all services to be performed in connection with the collection of the accounts.

We think that the case of *In re* Fishel, *supra*, is especially applicable to the case at bar.

The case of *In re* Messibovsky, *supra* (200 Fed. 562, Circuit Court of Appeals for the Second Circuit), is a companion case to and relies upon the Canfield case, *supra*.

In the Messibovsky case, as in the Canfield case, there was a contract by which the lender was to perform services in connection with the collection of accounts from customers of the borrower, the agreement being that the lender was to receive 6% per annum interest on money loaned, and an additional compensation of 2% on the amount due from customers for services performed. The

court in that case, as in the Canfield case, held that the additional per cent could be recovered as compensation for services performed. We call Your Honors' attention to this case for the reason that in the discussion of it the court draws the line of distinction between the cases where compensation, in addition to interest, is allowed the lender for services performed; and those cases in which the claim that services are to be performed is a mere cloak to cover a usurious charge of interest.

The court cites the case of *In re* Fishel, 198 Fed. 464, as being a case of the latter character.

In the case of Chase & Baker Company v. National Trust Co. (*supra*), (215 Fed. 633) in the District Court for the Northern District of Illinois, that court had before it a contract very similar to the one here, with one important difference, however, pointed out by the court in its opinion. The court held that contract to be valid on its face, but allowed the plaintiff, Chase & Baker Company, to amend its bill setting up the charge of usury, so as to properly charge, if it be so advised, that the transactions were, in fact, usurious loans. The court there referred to the opinions of the District Court and Circuit Court of Appeals, in this case, in the following language:

> "The decision *In re* American Fibre Reed Co., (D. C.) 206 Fed. 309, affirmed in the Court of Appeals, that the transactions were loans, not sales, was based, not merely on the documents, but on an agreed statement of facts. Moreover the documents are not identical with these in the present case. Both courts emphasize the importance of a provision deemed by them to indicate that the entire title to the accounts

did not pass. This provision, that in case an account is not paid at maturity, it should be repurchased at the amount theretofore actually paid thereon, about 75% of the face value, is replaced by the positive agreement to repurchase the accounts sold at their full face value. So far as the apparent intention of the parties is thereby indicated, this provision negatives any possibility of an apparent intent to retain title to any part of the account."

Whether the conclusion reached by the District Court in that case is correct, or not, is not necessary to be considered here. That court did not intend to say that the opinions of the courts which have already passed upon the case at bar were erroneous, as is shown by the above quotation, distinguishing the two cases. The case is referred to here because we wanted to bring to the attention of the court all reported cases dealing with contracts in any way similar to the one in this case.

It appears from the above, that these contracts have been before the various Circuit Courts of Appeals in only four cases, three (the Canfield, the Fishel and the Messibovsky cases) in the Second Circuit, and one (this case) in the Sixth Circuit. In two of those cases (the Canfield and the Messibovsky cases) the contracts were upheld; and in the other two (the Fishel case and this case) they were held to be loans at usury. In the Canfield, the Messibovsky and the Fishel cases, the contracts were admittedly for loans, and the question was whether a compensation allowed the lender, in addition to the legal interest on the money loaned was intended as pay for actual service to be rendered by the lender, or as additional

pay for the use of the money. The case at bar is the only one in which the claim is made that the contract was one of sale, and not of lending which has been before a Circuit Court of Appeals for decision.

On page 15 of its brief, appellant refers to that character of money-lenders known as "loan-sharks," and denies any sort of kinship between them and itself. The only "loan-shark" contract we have ever seen appears in the opinion of the court in the case of *In re* Home Discount Co., 147 Fed. 358. By comparing that contract with the one here, it will be seen that the business of appellant is about as closely related to that of the loan-shark as its name is to that of the shark operating in that particular case: *First,* both contracts purport, upon their face, to be a sale of property. *Second,* in both there is a representation that the seller is solvent. *Third,* both contracts appoint an "attorney in fact" and authorize him to execute any papers necessary to carry out the purposes of the contract. *Fourth,* both provide that if the buyer is unable to realize upon the property, upon the strength of which the advancement is made, it shall have the right to recoup itself out of other property. *Fifth,* both constitute the seller to be the agent of the buyer for the purpose of collecting the property assigned, and require it to account to the buyer for every cent collected thereon. *Sixth,* both contain a provision that, in the event the buyer sees fit to employ an attorney for any purpose in connection with the collection of the property the seller shall be taxed with the attorneys' fees.

In fact, the only practical difference between the two contracts is that in the loan-shark contract, the rate of interest is 120% per annum, while in the appellant's contract it is only 24%. This, however, is a difference of degree, and not of character. The former is a little worse than the latter, but both seem to us to belong to the same class, and neither of them can be said to be good—unless it be that appellant is to be commended for not raising its rates higher than 24%.

There is no getting around the fact that the only thing that appellant did was to advance money to the bankrupt in an amount equal to 75% of the face of the accounts, and then to receive back the money so advanced with the usury. There is no pretense that appellant did anything else, or undertook to do anything else, in connection with the collection of the accounts until after the filing of the petition in bankruptcy.

It seems to us that it is clear not only from the manner in which the contract was carried out by the parties, but from the very provisions of the contract itself, that the transaction in the case at bar amounted simply to an advance of money on security of the accounts, and not to a purchase and sale outright of those accounts. If Your Honors should conclude that we are right about this, of course, there can be no controversy but that the charge made by the appellant is usurious, and that the trustee should be required to settle with the appellant upon the basis indicated in the court's opinion below, and not upon the basis claimed in appellant's petition.

THE MANNING CLAIM AND CLAIM FOR ATTORNEYS' FEES IN THIS CASE.

In reference to the appellant's claims for reimbursement of the $800 paid by it to E. Manning, the attorney in fact designated in the contract, it appears from the statement of facts (Record, page 42), that from the execution of the contracts until the filing of the petitions in bankruptcy against the bankrupts—which petitions were filed February 2, 1912—E. Manning was an employe of the bankrupts, and was paid a regular monthly salary for his services, including the services rendered by him as such attorney in fact. In fact, in attending to the collection of the accounts, he was but performing one of the duties incident to his employment by the bankrupts, and it was never intended that he should receive anything additional for discharging these duties.

After the filing of those petitions, and until the Custodian for the estates was appointed—that it, from February 2, 1912, until April 9, 1912, he continued to discharge his duties as such employe of the bankrupts, and was paid by the bankrupts his regular salary as such employe—just as he had been paid before the petitions were filed—with the exception of two weeks prior to April 9, 1912. For those two weeks, the bankrupts still owe him. After the appointment of the Custodian, E. Manning was employed as clerk to the Custodian; and after the qualification of the trustee, he was employed as clerk to the trustee, at a salary agreed upon and paid to him out of the bankrupt estates, as an expense of the administra-

tion. His employment as clerk to the trustee continued until January, 1913.

The amount claimed by appellant, on account of payments made to Manning, is eight monthly payments of $100 each, the first payment having been made on March 16, 1912 (Record, p. 44). There is no evidence to that effect, but it is fair to assume that this payment was supposed to cover services rendered by Manning during the month ending March 16th, that is for the latter part of February, and the first part of March, 1912. We are at a loss to understand upon what theory appellant proceeded in paying Manning for any services, real or imaginary, during the months of February and March, 1912; for the agreed facts show that during those two months, he drew his full and regular salary from the bankrupts, just as he had done all along from the beginning of the contracts.

If we concede that appellant's construction of the 6th clause of the contract is correct, there is nothing, even in that construction that authorized appellant to pay Manning anything whatever as long as he was being paid in full by the bankrupts.

After the Custodian took charge of the estates, on April 9, 1912, Manning's duties and services as attorney-in-fact ceased. The custodian himself entered upon the collection of these accounts and continued that work upon his qualification as trustee. It is for these very collections made by the Custodian and trustee that this suit is brought. After April 9, 1912, no more collections made were remitted to appellant, and all services rendered by

Manning in connection with the accounts were rendered as clerk to the Custodian and trustee, for which services he was paid a somewhat higher salary than was paid him by the bankrupts. He rendered no services as attorney in fact, after April, 1912, and, as stated by the Special Master in his opinion (Record, p. 51), it can not well be seen how he could have rendered any service in that capacity during that time. Nor can we understand for what service the payments during the months of April, May, June, July, August, and September, 1912, were made.

The claim of appellant that it should be allowed a fee for the services of its attorney in these proceedings, certainly involves a very strained construction of the 8th clause of the contract, and we think was properly disallowed by the court.

SUMMARY.

To recapitulate the statement for appellee, we insist that the contracts between appellant and the bankrupts were contracts of lending and borrowing, and not of sale. Our reasons for this may be summed up as follows:

(1) The contracts show on the face, that they are for loans and not for sales:

(a) Because there is no transfer of the absolute property in the accounts as distinguished from a special property, and no definite price is fixed as the purchase price.

(b) Because of the nature of the "guarantee" provided for in the fourth clause of the contracts.

(c) Because appellant was, in no event, to receive the face of the accounts, but was limited in its recovery to the amount advanced, plus the discount, and to this much it was to be entitled in any event.

(d) Because of the bond required of the bankrupts, for the faithful performance of the contracts by them.

(e) Because the bankrupts retained control of the accounts, with all of the indicia of ownership, and were required to bear the labor and expense of collecting them.

(f) Because the undertaking of the bankrupts to repay appellant was direct and unconditional, and they, with their sureties, were alone looked to for repayment.

(g) Because the bankrupts were required to pay attorneys' fees, costs, and expenses of collection, if at any time, appellant saw fit to collect the accounts by suit.

(2) We also say that the Agreed Facts as to the operations under the contracts show that they were intended as loans, and not as sales.

(3) That these contracts—being for loans and not for sales—it follows as a matter of course that the interest charged was usurious.

(4) That, under the circumstances of this case, appellant is not entitled to recover the money paid to E. Manning, the attorney-in-fact.

(5) That, under the contracts, appellant is not entitled to recover its attorneys' fees incurred in the prosecution of this proceeding.

In conclusion we submit that the judgment of the Circuit Court of Appeals herein was proper and should be affirmed. In the event Your Honors should arrive at a different conclusion, and should find that there should be a reversal herein, we call your attention to a "clerical misprision" in appellant's brief (page 49), as to the amount for which it should have judgment. It appears from the "Agreed Facts" (Record, p. 43) that appellee has collected of the accounts due the New England Chair Company, $2,845.88, and of those due the American Fibre Reed Company, $2,364.34; and it is for these two amounts that appellant says it ought to have judgment. It is to be remembered, however, that these sums represent the *face* of the accounts collected by appellee. According to appellant's contention, it is only entitled to have paid back to it 75% of these amounts, plus the discounts or service charge amounting to $22,276.70, in the New England Chair Company accounts and $1,891.47, in the American Fibre Reed Company accounts.

We submit this case with the contention that no error has been committed.

Respectfully submitted,

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Of Counsel.

HOME BOND COMPANY *v.* McCHESNEY, TRUSTEE IN BANKRUPTCY OF AMERICAN FIBRE REED COMPANY AND NEW ENGLAND CHAIR COMPANY.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 90. Argued December 3, 1915.—Decided January 10, 1916.

This court follows the conclusions, reached by the Special Master and affirmed by both courts below, that transactions purporting to be purchases of accounts receivable from the bankrupt were really loans with the accounts transferred as collateral security.
210 Fed. Rep. 893, affirmed.

THE facts, which involve construction of contracts between the bankrupt and one dealing with him and determination of whether such contracts were purchases of accounts or loans with the accounts as collateral, are stated in the opinion.

Mr. Robert Kinkead, with whom *Mr. S. M. Sapinsky*, *Mr. James R. Duffin*, *Mr. Owen D. Duffin* and *Mr. S. M. Stockslager* were on the brief, for appellant.

Mr. Lewis A. Nuckols, with whom *Mr. John Bryce Baskin* and *Mr. Eli H. Brown, Jr.*, were on the brief, for appellees.

MR. JUSTICE PITNEY delivered the opinion of the court.

The New England Chair Company, and its successor, the American Fibre Reed Company, are Kentucky corporations which were engaged in business at Frankfort, in that State. On February 1, 1912, involuntary petitions in bankruptcy were filed against both companies, and they were duly adjudicated bankrupts. The two cases in bankruptcy were consolidated and directed to proceed as one cause, and the estates are under administration as one estate. The present appellant, The Home Bond Company, an Indiana corporation, filed intervening petitions, claiming certain funds in the hands of the trustee, obtained by him through the collection of accounts receivable of the bankrupt corporations, to which the petitioner claimed title under two contracts in writing made between it and the respective corporations; one with the New England Chair Company under date March 6, 1911, the other with the American Fibre Reed Company under date November 9, 1911, after the latter had taken over the assets and assumed the liabilities of the Chair Company. These agreements are identical in form, and a copy of one is set forth in the margin.[1]

[1] This agreement, made this 6th day of March, 1911, at Indianapolis, Indiana, by and between New England Chair Co., hereinafter called first party, and the Home Bond Company, hereinafter called second party.

Witnesseth, that, for One Dollar ($1.00) and other good and valuable

Petitioner also set up a claim against the trustee for the sum of $800, being $100 per month from March 16 to October 12, 1912, inclusive, paid by it to one Manning,

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considerations, each to the other paid, receipt whereof is hereby acknowledged, the parties hereto have agreed and do hereby agree as follows:

First. That said second party shall buy from said first party all acceptable accounts tendered to it by said first party and pay therefor the face value thereof less the following discounts:

1 per cent. on accounts that are paid within 15 days;
2 per cent. on accounts that are paid within 30 days;
3 per cent. on accounts that are paid within 60 days;
4 per cent. on accounts that are paid within 90 days;
5 per cent. on accounts that are paid within 120 days;
6 per cent. on accounts that are paid within 150 days;
7 per cent. on accounts that are paid within 180 days;

subject however, to the terms of this and any subsequent written agreements executed by the parties hereto.

Second. That the second party shall pay:

78 per cent. on 30 day accounts;
77 per cent. on 60 day accounts;
76 per cent. on 90 day accounts;
75 per cent. on 120 day accounts;
74 per cent. on 150 day accounts;
73 per cent. on 180 day accounts;

upon delivery to and acceptance by second party of such accounts duly assigned to the party of the second part; and the remainder, less discount and deductions taken by the debtor, shall be paid immediately after the collection of the account by the second party, provided, however, no payment of the remainder shall be made while any of said accounts are in default.

Third. The first party shall properly assign and deliver to said second party all accounts purchased, including the right of stoppage in transitu, either in the name of the party of the first part or in the name of the party of the second part (provided, however, the party of the second part shall not be charged with negligence in not making stoppage in transitu in any event unless thereunto requested by the party of the first part). If the merchandise named in the accounts should be refused or returned, for any cause, the title to such merchandise shall be and remain in said second party until such accounts are paid.

Fourth. Said first party hereby guarantees the payment to the second

who in the sixth clause of the contract of November 9, 1911, was by the Reed Company appointed attorney in fact to receive remittances in payment of the accounts

party or its assigns of all accounts purchased hereunder according to the terms thereof. In the event of non-payment at maturity to said second party, of any accounts purchased as aforesaid, or should the debtor become insolvent, said first party hereby covenants and agrees to repurchase said accounts within five days after receipt of written notice thereof, and to pay therefor the same amount paid to the first party by said second party, plus the discount provided for in the first paragraph of this contract; said second party is hereby given the right without notice to said first party to credit any moneys coming into its possession, belonging to said first party, on its accounts.

Fifth. Immediately after the purchase of every account hereunder, said first party shall make upon its book an entry showing the absolute sale of said accounts to said second party, and said second party is hereby given the right and privilege of auditing the books, accounts and records of said first party, relating to said accounts, at any time that it may see fit so to do.

Sixth. Whereas it is for the mutual benefit of the parties hereto that the collection of said accounts shall in the first instance be remitted to the party of the first part and in its name; the party of the first part shall at all times appoint some person or persons mutually acceptable to both of the parties hereto, their attorney-in-fact to receive all such remittances in whatever form they may be made, and to transfer, assign and transmit all such proceeds to said party of the second part.

And said party of the first part shall immediately upon receipt of such remittances in whatever form the same shall be made, deliver the same to such attorney for transmittal to the party of the second part; and said attorney shall at all times have access to all mail received by said party of the first part and all books and records of the party of the first part, to discover what payments and remittances are made upon such accounts.

And in consideration of the execution of this agreement by the party of the second part, said party of the first part undertakes and agrees to guarantee the faithful conduct of said attorney-in-fact in the receipt, assignment and transmittal of all such payments or remittances. And upon the like consideration said party of the first part shall pay unto said attorney-in-fact compensation for all such services so rendered in that behalf; and that we will furnish and provide for said attorney-in-fact all necessary clerical or stenographic assistance for making reports

receivable and transmit them to petitioner. It was averred that $100 per month was a reasonable charge and that under the provisions of the sixth clause the Reed Company was to pay Manning, but failed to do so, and petitioner was compelled to make such payment.

The trustee filed answers contesting the principal claim on the ground that the transactions between petitioner and the bankrupt corporations did not amount to a purchase of the accounts receivable but constituted mere loans of money (with the accounts assigned as collateral

to party of the first part, and all postage or express charges for transmitting reports and remittances; said attorney-in-fact shall also have the right and power, and it shall be his duty to endorse the name of the party of the first part on any freight or express bill or bill of lading relating to said accounts; and ratifying and confirming all its said attorney may do in the premises. And said attorney-in-fact as to all such matters shall receive such moneys or other remittance solely for the party of the second part and shall at all times be subject to its exclusive orders with relation thereto; and it is now mutually agreed between the parties hereto that E. Manning shall be and continue such attorney-in-fact to perform such duties, until by mutual agreement of the parties hereto, another person shall be appointed in his stead.

Seventh. That said second party in making purchase of accounts hereunder relies upon the guaranties and covenants of said first party herein contained and upon the written representations made to it by said first party as to the financial responsibility of said first party; that said written representation heretofore made and that may hereafter be made are for the purpose of establishing the credit of said first party with said second party so that sale of accounts may be made hereunder.

Eighth. That said first party shall execute and deliver to said second party or its assigns, any document necessary or proper to carry into effect this contract and should second party employ counsel or cause legal action to be instituted to enforce the payment of any of said accounts, or any part thereof, either in its own name or of the name of the party of the first part, then and in either case said first party shall immediately pay to said second party or its assigns, all court costs, expenses, attorney's and stenographer's fees which may be by it expended in such proceedings.

In Witness Whereof, etc.

security) at usurious rates of interest, and traversing the claim for moneys paid to Manning upon grounds that will appear below. The special master to whom the matter was referred overruled the claim, sustaining the trustee's contention, and holding, in view of the agreed statement of facts submitted to him by the parties in lieu of proof, that the contracts were not sales of the accounts by the respective bankrupt corporations to petitioner, but were transfers of the accounts as security for loans; and that these loans were made at usurious rates of interest, whether the contracts were made in Indiana or Kentucky, since the amounts retained as a "service charge" under the contracts amounted to at least 24 per centum per annum on the moneys paid by the petitioner from the time of payment to the time of reimbursement, while the statutes of both States fixed six per centum per annum as the legal rate of interest, providing that any excess might be relieved against, and if paid recouped, and while the Indiana statute permitted interest up to 8% to be contracted for in writing, it provided that if over 8% were contracted for or collected, all over 6% should be forfeited. The special master therefore held that in the settlement the transactions between the petitioner and trustee should be purged of usury, and the petitioner be treated as a creditor of the bankrupt corporations with security for its debt. As to the claim for the $800 paid by petitioner to Manning, the special master overruled this upon the ground that there was nothing to show what services, if any, were rendered by Manning as attorney in fact during the time from March 16, 1912, to November 12, 1912. It appeared that during the continuance of the contracts between the petitioner and the Chair Company and the Reed Company respectively, Manning was an officer and employé of the respective companies; that for all services rendered by him while so employed by these companies, including such as he

rendered as attorney in fact, he was to receive a regular salary, which was paid to him by the Chair Company until the business was taken over by the Reed Company, and then by it until April 9, 1912, when the custodian took charge of the bankrupts' estates, with the exception of salary for the two weeks ending April 9, which was owing to him from the Reed Company; that from April 9 to September 9, 1912, Manning was in the employ of the custodian as clerk, and thereafter in the employ of the trustee in the same capacity, and his salary for this employment had been paid him out of the bankrupts' estates. The special master also overruled a claim made by petitioner for allowance of its counsel fee in the same proceedings. The demand for such allowance was based upon the eighth clause of the agreement, which it was contended was broad enough to embrace not only counsel fees incurred in the collection of accounts receivable from delinquent debtors or customers of the Chair Company or the Reed Company, but also counsel fees incurred by petitioner in collecting directly from either of those companies any accounts receivable which had come into its hands and for which it or its trustee in bankruptcy failed to account.

Thereupon the special master stated an account between the petitioner and the bankrupts' estates, making the proper allowances for the usury, finding a balance of only $576.10 due from the trustee to the petitioner, and recommending that this be ordered paid over, but only upon condition that the petitioner turn over or account to the trustee for the contracts of March 6, 1911, and November 9, 1911, and any uncollected accounts or papers connected with the uncollected accounts delivered to it under those contracts.

Petitioner's exceptions to this report were overruled by the District Court (206 Fed. Rep. 309), and a decree was entered in accordance with the recommendations of

the special master. The Circuit Court of Appeals affirmed the decree. 210 Fed. Rep. 893.

Upon the present appeal it is insisted that there was error in holding that petitioner and appellant, by virtue of the contracts between it and the bankrupts and the transactions and conduct of the parties, did not become the purchaser or owner of the accounts receivable in question, and that the transactions were really loans, with the accounts receivable transferred as collateral security. But it seems to us so entirely clear that the conclusions reached by the special master and approved by both courts were correct that we deem it unnecessary to discuss the matter at any length. To quote from the opinion of the District Court: "The considerations which support this conclusion are that the bankrupts were to and did collect the accounts and bear all expense in connection with their collection; what is claimed to have been the purchase price for the accounts, to-wit: the difference between the face of the accounts and the discount, was not known until payment of the account and receipt thereof by the Company and then depended on the time that had elapsed since the date of the advance of the seventy-five per cent; what is claimed to have been deferred payment of the purchase price was simply a return to the bankrupt of the excess of the collection over and above the advance and discount; and the provision that, in the event of non-payment of any of the accounts at maturity or the debtor becoming insolvent, the bankrupt should repurchase the account and pay therefor the advance made thereupon plus the discount. . . . In so far as the contracts in question here use words fit for a contract of purchase they are mere shams and devices to cover loans of money at usurious rates of interest. That the company was not adverse to the use of shams is otherwise apparent from the use by it of the word 'service,' in its dealings with the bankrupts under the con-

tracts, to characterize the discounts. In any view of the contracts those discounts were not charges for services rendered the bankrupts. Loans are never regarded as services."

Houghton v. *Burden*, 228 U. S. 161, affirming *In re Canfield*, 193 Fed. Rep. 934, is plainly distinguishable, for there the contract contemplated actual services by the lender, and this provision was found not to have been a mere cover for usury.

The rulings adverse to the claim for moneys paid to Manning and for counsel fees in the proceedings are so manifestly correct as to require no discussion.

Decree affirmed.